THE
MADRAS LAW JOURNAL
REPORTS.

EDITORIAL COMMITTEE:

MR. T. R. VENKATARAMA SASTRI, B.A., B.L., C.I.E.
" B. SITARAMA RAO, B.A., B.L., *Editor-in-charge.*
RAO BAHADUR K. V. KRISHNASWAMI AIYAR, B.A., B.L.
MR. T. M. KRISHNASWAMI AIYAR, B.A., B.L.

ASSISTANT EDITORS:

MR. C. A. SESHAGIRI SASTRI, B.A., B.L.
" S. PANCHAPAGESA SASTRI, B.A., M.L.

REPORTERS:

MR. R. C. CALBURN, BARRISTER-AT-LAW, *Privy Council.*
" B. V. VISVANATHA AIYAR, M.A., B.L., *High Court.*
" S. V. VENUGOPALACHARI, B.A., B.L., "
" K. CHANDRASEKHARA AIYAR, M.A., B.L., "

[1937] I M. L. J.
January—June.

PUBLISHED BY
MR. R. NARAYANASWAMI IYER, B.A., B.L.,
Advocate, High Court, Mylapore, Madras.

PRINTED AT THE MADRAS LAW JOURNAL PRESS, MYLAPORE.
[*All Rights Reserved.*]

JUDGES OF THE HIGH COURT.

JANUARY—JUNE, 1937.

Chief Justice.

The Hon'ble Sir Horace Owen Compton Beasley, *Kt.* (*Barrister-at-Law*).

Puisne Judges.

The Hon'ble Sir M. Venkatasubba Rao, *Kt.*, B.A., B.L.
The Hon'ble Mr. Justice C. Madhavan Nair (*Barrister-at-Law*).
,, ,, H. D. Cornish (*Barrister-at-Law*).
,, ,, S. Varadachariar, B.A., B.L. (Rao Bahadur).
,, ,, S. Burn, I.C.S. (*On leave*)
(from 4th January to 6th May, 1937).
,, ,, Vere Mockett (*Barrister-at-Law*).
,, ,, V. Pandrang Row, B.A., I.C.S.
,, ,, A. J. King, I.C.S.
,, ,, S. Wadsworth, I.C.S. (*Barrister-at-Law*).
,, ,, P. Venkataramana Rao Nayudu, B.A., B.L.
(Rao Bahadur).
,, ,, K. P. Lakshmana Rao, B.A., B.L. (Diwan Bahadur).
,, ,, F. W. Gentle (*Barrister-at-Law*).
,, ,, J. C. Stodart, I.C.S.

Officiating Judge:

The Hon'ble Mr. Justice L. C. Horwill, I.C.S.
(from 4th January to 6th May, 1937).

The Advocate-General.

Sir Alladi Krishnaswami Aiyar, *Kt.*, B.A., B.L. (Diwan Bahadur).

TABLE OF CASES REPORTED.

PRIVY COUNCIL.

	PAGE.
Alexander Perera Chandrasekara *v.* The King	600
Attorney-General of New Zealand Insurance Co., Ltd. *v.* New Zealand Insurance Co., Ltd.	58
The Commissioner of Income-tax, Bombay Presidency and Aden *v.* The Bombay Trust Corporation, Ltd.	200
Hazariram Marwari *v.* Rai Bahadur Bansidhar Dhandhania	254
Hubert Rowan Hodge *v.* Shahebzada Mahomed Kamgar Shah	702
Kalyanji *v.* Commissioner of Income-tax, Bengal	312
Kayastha Pathashala, Allahabad *v.* Mt. Bhagwati Devi	166
Mangal Singh *v.* Emperor	382
Mt. Biro *v.* Atma Ram	646
Palanivelu Mudaliar *v.* Neelavathi Ammal	719
Pir Ahsanulla Shah *v.* Pir Ziauddin Shah	538
Rangachari *v.* Secretary of State for India in Council	515
Sarat Chandra Basu *v.* Bijoy Chand Mahatab	479
Sardar Vinayakrao Dhundiraj *v.* Secretary of State for India in Council	367
Venkata Rao *v.* Secretary of State for India in Council	529
Venkata Seshayya *v.* Kotiswara Rao	113
The United Motor Finance Company *v.* Messrs. Addison & Co.	432

HIGH COURT (FULL BENCH).

Arumugham Chetti *v.* Subramaniam Chetti	679
The Board of Commissioners for the H. R. E., Madras *v.* Ratnasami Pillai	105
Chellappa Chettiar *v.* Commissioner of Income-tax, Madras	351
Chidambara Nadar *v.* Rama Nadar	453
Commissioner of Income-tax, Madras *v.* Chengalvaroya Chettiar	182
Commissioner of Income-tax, Madras *v.* Rajah of Bobbili	707
Kanniappa Naicker & Co. *v.* Commissioner of Income-tax, Madras	619
Madana Mohana Naiko *v.* Krupasindhu Naiko	1
Muthu Moopan, *In re*	334
Narayana Aiyangar *v.* Subramanian Chettiar	233
Rajah of Vizianagaram *v.* China Thammanna	91
Secretary of State for India in Council *v.* Veeranna	732
The Secretary to the Board of Revenue *v.* Alagappa Chettiar	174
The Secretary to the Board of Revenue *v.* Madura Mills Co., Ltd.	108
Sivasuryanarayana Chetti *v.* Audinarayana Chetti	8

	PAGE.
Suryanarayaneswara Jogi Jagannadharaju *v.* Rajah of Vizianagaram ..	216
Swaminathan *v.* Official Receiver of Ramnad ..	727
Viroopakshan Nambudripad *v.* Chembu Nayar ..	83

OTHER CASES.

Abdur Rahiman Kutty, *In re* ..	498
Alla Satyam, *In re* ..	759
Amina Bibi *v.* Kadir Batcha Rowther ..	739
Ankamma *v.* Bamaneppa ..	192
Arunachalam Chettiar *v.* Kalayappa Chettiar ..	180
Asam Kutti *v.* Koyyaman Kutti ..	658
Bapanna *v.* Vengayya ..	296
Bavamma *v.* Papanna ..	133
Bommi Reddi Muni Reddi *v.* Subbiah ..	635
Chairman, Municipal Council, Rajahmundry *v.* Subba Rao ..	496
Chakrapani Naidu *v.* Venkataraju ..	611
Chidambaram Chettiar *v.* Pethaperumal Chettiar ..	605
Chidambaram Chettiar *v.* Swaminathan ..	33
Chidambaram Chettiar *v.* Venkatasubba Naik ..	262
China Suryarao *v.* Suryachandra Rao ..	676
Deivasigamani Ponnambala Desikar *v.* Zamindar of Sivaganga ..	662
Desu Reddiar *v.* Srinivasa Reddi ..	41
The Dharapuram Janopakara Nidhi, Ltd. *v.* Lakshminarayana Chettiar ..	642
Filix Joseph Saraprasadam *v.* Subramania Chettiar ..	447
Firm of Ayili Mallappa *v.* Parasetti Sidramappa ..	469
Ganesa Aiyar *v.* Lakshmi Co-operative Building Society ..	511
Ganesa Naidu *v.* Malla Ram Singh ..	507
Gopalakrishna Nayakar *v.* Madhavanayaki Ammal ..	14
Govinda Chettiar *v.* Uttukottai Co-operative Society ..	640
Govindasubbaramayya, *In re* ..	750
Hajee Moosa Sait and Brothers *v.* Abdul Karim ..	143
Hanumanthappa, *In re* ..	75
Hiralal Jindani *v.* The Official Assignee of Madras ..	130
Kaliappa Udayan, *In re* ..	613
Karaia Nachi Bivi *v.* Allapichai ..	572
Karuppa Goundan *v.* Gopanna Mannadiar ..	189
Khaji Dodda Khaji Saib *v.* Nanjappa ..	197
Konda Moopan, *In re* ..	74
Koyakutti *v.* Veeran Kutti ..	407
Krishnaswami Naidu *v.* Municipal Council, Bellary ..	597
Kunhi Raman *v.* Govindan ..	329
Kuppan Chettiar *v.* Masa Goundan ..	249
Lakshmanaswami *v.* Mahammad Galah Hussain Saheb ..	580
Lalithambal Ammal *v.* Guardian of India Insurance Co., Ltd. ..	735
Lakshmanaswamy *v.* Narasimha Rao ..	414
Mahalakshmamma *v.* Ramayya ..	21
Manickam Chetty *v.* Kamalam ..	95
Marudamuthu *v.* Arumugasami ..	264

	PAGE.
Maruthappa Servai *v.* Niraikulathan Servai ..	331
Marwadi Vannaji *v.* Ranga Rao ..	384
Mathuranayagam Pillai *v.* The Municipal Council, Madura ..	125
Meenakshi Ammal *v.* Ramaswami Josier ..	28
Methar Rowther *v.* Sahu Moideen Rowther ..	122
Moosa Sahib *v.* Subbamma ..	672
Muthuswami Servai *v.* Mytheen Pichai Rowther ..	231
Nanu Nair *v.* Kathiyayini Ammal ..	618
Narayana Rao *v.* Venkatappayya ..	543
Palaniappa Chettiar *v.* Ramaswami Servai ..	667
Panchayat Board, Sivaganga *v.* Pillathian Servai ..	101
Pandia Chinna Thambiar *v.* Veerappa Pandian ..	77
Pattinathan, *In re* ..	178
Pavani Subbamma *v.* Anumala Rama Naidu ..	268
Perumal Mudaliar *v.* S. I. Ry. Co., Ltd. ..	341
Public Prosecutor *v.* Venkata Nari ..	743
Raghavalu *v.* Narasa Reddi ..	120
Raju Chetty *v.* Raju Chetty ..	287
Ramakrishna Mudaliar *v.* Manikka Mudaliar ..	587
Ramakrishna Rao *v.* Subba Rao ..	501
Ramanadha Aiyar *v.* Narayanaswamy Aiyar ..	163
Ramanathan *v.* Meyappa Chettiar ..	36
Ramanathan Chettiar *v.* S. R. M. M. C. T. M. Firm ..	16
Ramanuja Jeer Swamigal *v.* Pichu Ayyangar ..	559
Ramanujiah *v.* The Commissioner, Corporation of Madras ..	138
Ramaswami Aiyangar *v.* Sivakasi Municipality ..	274
Ramaswamy Aiyar, *In re* ..	310
Ramiah Baghavathar *v.* Chinna Karuppan Servai ..	566
Rathnammal *v.* Secretary of State for India in Council ..	321
Ratna Mudaliar *v.* Krishna Mudaliar ..	390
Roshan Chinna Minulla Hussain Saheb *v.* Municipal Council, Adoni.	440
Sadasivam Pillai *v.* Varadaraja Odayar ..	89
Sambasiva Reddi *v.* Official Receiver, South Arcot ..	654
Sandanam Pillai *v.* Somasundaram Chettiar ..	364
The Secretary of State for India in Council *v.* Paul Appaswami ..	159
Sellappa Chettiar *v.* Suppan Chettiar ..	422
Seshapani Chetty *v.* Emperor ..	154
Shanmukam *v.* Nachu Ammal ..	278
Sivasankara Mudaliar *v.* Krishnaswamy Mudaliar ..	88
Sreenivasa Ayyangar *v.* H. R. E. Board, Madras ..	442
Sreeramamurthy *v.* Ranganayakulu ..	388
Sri Mahant Sitaram Dass Bavaji *v.* The Madras Religious Endowment Board ..	475
Sri Rajah Durgarajulum Garu *v.* Unlimited Aryan Bank of Vizagapatam ..	303
Subramania Aiyar *v.* Meenakshisundaram Chettiar ..	637
Subramania Asari *v.* Ramaswami Pillai ..	569
Subbarama Aiyar *v.* Damodaran ..	128
Subbaratnam Chettiar *v.* Gunavanthalal Vidyasankar ..	224
Subramanian Chettiar *v.* Somasundaram Chettiar ..	60
Sundara Mudaliar, *In re* ..	473
Sundararaja Aiyangar *v.* Mannarswami ..	610
Swami Naidu *v.* Natesa Aiyar ..	616

	PAGE.
Taluq Board of Koilpatti *v.* Zamindar of Sivagiri ..	50
Thirumalamuthu Adaviar *v.* Subramania Adaviar ..	243
Varadarajulu Naidu, *In re* ..	396
Veerayya *v.* Sobhanadri ..	489
Venkatachala Chetty *v.* Natesa Chetty ..	346
Venkatachariar *v.* South Indian Bank ..	575
Venkatanarasimharaju *v.* Siddha Chetty ..	399
Venkatanarayana Aiyar, *In re* ..	338
Venkataraju Garu *v.* Maharajah of Pithapuram ..	632
Venkatarama Aiyar *v.* Sarvothama Rao ..	219
Venkataswamy Naicken *v.* The Secretary of State for India in Council ..	151
Venkateswarulu *v.* The District Election Officer, Kistna ..	157
Vijiathammal *v.* Kadir Sultan ..	23
Viranna *v.* Venkayya ..	37
Viswanatham *v.* Satyanandam ..	147
Viyathan Mahadevi *v.* Aydross Kurikkal ..	324
In the matter of Universal Mutual Aid and Poor Houses Association, Ltd., Madras ..	10

TABLE OF CASES CITED.

PAGE.

Abdul Aziz *v.* The Punjab National Bank, Ltd., (1929) I.L.R. 10 Lah. 570 at 578 and 579 .. 635
Abdul Ghani *v.* Chiranji Lal, (1927) I.L.R. 49 All. 726 .. 264
Abdul Hussain Khan *v.* Sona Dero, (1917) 34 M.L.J. 48=L.R. 45 I.A. 10=I.L.R. 45 Cal. 450 at 467 (P.C.) .. 67
Abdul Jabbar *v.* Sanu Bibi, A.I.R. 1934 Cal. 740 .. 149
Abdul Karim Sahib *v.* Lakshmanaswami, (1927) 27 L.W. 475 .. 464
Abdul Latif Moonshi *v.* Jadub Chandra Mitter, (1897) I.L.R. 25 Cal. 216. 661
Abdul Majid Khan *v.* Saraswati Bai, (1933) 66 M.L.J. 65=L.R. 61 I.A. 90 (P.C.) .. 550
Abdul Muhammad Rowther *v.* Seethalakshmi Ammal, (1930) 130 I.C. 666. 307
Abdul Rahaman *v.* D. K. Cassim & Sons, (1932) 64 M.L.J. 307=L.R. 60 I.A. 76=I.L.R. 11 Rang. 58 at 63. (P.C.) .. 350
Abdul Rahim *v.* Amir Begum, (1926) I.L.R. 7 Lah. 365 .. 618
Abhiram Goswami *v.* Shyama Charan Nandi, (1909) 19 M.L.J. 530=L.R. 36 I.A. 148=I.L.R. 36 Cal. 1003 (P.C.) .. 690
Adhikanda Sahu *v.* Johi Sahu, (1921) 70 I.C. 295 .. 418
Ahammad Kutty *v.* Kottekkat Kuttu, (1932) 64 M.L.J. 251=I.L.R. 56 Mad. 458 .. 408, 411
Aisamma *v.* Moideen, (1923) 45 M.L.J. 690=I.L.R. 47 Mad. 160 .. 644
Alaga Pillai *v.* Ramaswami Thevan, (1925) 49 M.L.J. 742 .. 694
Alcock, Ashdown and Company, Limited *v.* The Chief Revenue Authority of Bombay, (1923) 45 M.L.J. 592=L.R. 50 I.A. 227 at 232=I.L.R. 47 Bom. 742 (P. C.) .. 203, 215
Ali Khan *v.* Brij Kishore, (1870) 2 N.-W.P. 182 .. 199
Alimunnissa Chowdhurani *v.* Shama Charan Roy, (1905) I.L.R. 32 Cal. 749 .. 240
Allen *v.* Flood, (1898) A.C. 1 at 72 .. 521
Amarendra Mansingh *v.* Sanatan Singh, (1933) 12 Pat. 642 .. 69, 70
Ambalavana Chetti *v.* Singaravelu Udayar, (1912) M.W.N. 669 .. 691
Ambalavana Pandara Sannathi *v.* Secretary of State for India, (1905) 15 M.L.J. 251=I.L.R. 28 Mad. 539 .. 161
Amirthammal *v.* Ratnaswami Padayachi, (1933) M.W.N. 1266 .. 121
Ammakannammal *v.* Damodara, A.I.R. 1928 Mad. 66 .. 728, 731
Ammalu Ammal *v.* Namagiri Ammal, (1917) 33 M.L.J. 631 .. 448
Anandacharlu *v.* Hindu Religious Endowments Board, (1936) M.W.N. 1045. 446
Ananda Rao *v.* Appa Rao, (1924) 47 M.L.J. 700 .. 118
In re. Anglo-Austrian Printing and Publishing Union (Issac's Case), 1892 2 Ch. 158 at 164 .. 513
Anjaneya Sastri *v.* Kothandapani Chettiar, (1935) 43 L.W. 409 .. 476
Annabhat Shankarbhat *v.* Shivappa Dundappa, (1928) I.L.R. 52 Bom. 376. 247
Annamalai Chetty *v.* Annamalai Chetty, (1919) 10 L.W. 67 .. 178
Annamalai Chetti *v.* Lieut.-Col. J. G. Cloete, (1881) I.L.R. 4 Mad. 204. 2, 5
Anokh Singh *v.* Sapuran Singh, (1923) 79 I.C. 980 .. 333
Aparna Debi *v.* Sree Sree Shiba Prashad Singh, (1924) I.L.R. 3 Pat. 367. 81, 83
Appa Rao *v.* Krishna Aiyangar, (1901) 25 Mad. 537 .. 411
Appovier *v.* Ramasubba Aiyan, (1866) 11 M.I.A. 75 .. 97

PAGE.

Arumugha Padayachi *v.* Muthal Reddi, (1930) M.W.N. 1051 .. 124
Arunachala Aiyar *v.* Subbaramiah, (1922) 43 M.L.J. 632=I.L.R. 46 Mad. 60 .. 634
Arunachalam Chetty *v.* Rangaswami Pillai, (1914) 28 M.L.J. 118=I.L.R. 38 Mad. 922 (F.B.) .. 740, 742
Atchuta Ramayya Garu *v.* Official Receiver, East Godavari, (1935) 69 M.L.J. 241=I.L.R. 58 Mad. 1032 .. 639
Attorney-General *v.* Sillem, (1864) 10 H.L.C. 704 .. 460
Atul Krishna Roy *v.* Lala Nandanji, (1935) I.L.R. 14 Pat. 732 (F.B.). 246, 247
Auto Supply Co., Ltd. *v.* Raghunatha Chetty, (1929) 57 M.L.J. 618 at 620, 621 .. 434
Ayya Kutti Mankondan *v.* Periasami Koundan, (1913) 1 L.W. 31 .. 124
Ayya Pillai *v.* Ayyadurai Goundan, (1934) 67 M.L.J. 927 .. 228
Ayyappa *v.* Venkatakrishnama Razu, (1892) 2 M.L.J. 219=15 Mad. 484 .. 89
Ayyaswami Pillai *v.* Guruswamy Naicken, (1916) 3 L.W. 463 .. 550, 558
Azhagappa Chetty *v.* Ramanathan Chettiar, (1932) 64 M.L.J. 629 at 636 .. 302

B

Babu *v.* Official Assignee, Madras, (1934) 67 M.L.J. 167=L.R. 61 I.A. 257=I.L.R. 57 Mad. 931 (P.C.) .. 98
Bachu Soorayya *v.* Toomuloori Chinna Anjaneyalu, (1918) 36 M.L.J. 106. 403
Bada Kristam Naidu *v.* Durvada Patrudu, (1927) 53 M.L.J. 568 .. 35
Badar Bee *v.* Habib Merican Noordin, (1909) A.C. 615 .. 235
Baijnath's Case, (1921) 40 M.L.J. 387=L.R. 48 I.A. 195=I.L.R. 43 All. 228 (P.C.). 428, 429, 712
Baij Nath *v.* Dhani Ram, (1929) I.L.R. 51 All. 886 .. 4
Baijnath Sahai *v.* Ramgut Singh, (1896) L.R. 23 I.A. 45=I.L.R. 23 Cal. 775 at 784 (P.C.) .. 460
Bai Kasturbai *v.* Vanmalidas, (1925) I.L.R. 49 Bom. 710 .. 398
Balla Mal *v.* Ata Ullah Khan, (1927) L.R. 54 I.A. 372 at 380 .. 168, 173
Balmukund Lal *v.* Musammat Sohano Kueri, (1928) I.L.R. 8 Pat. 153 at 159. 48
Baluswami Aiyar, *In re,* (1928) 55 M.L.J. 175=I.L.R. 51 Mad. 417 (F.B.) .. 251, 254
Balwant Singh *v.* R. Clancy, (1912) 23 M.L.J. 18=L.R. 39 I.A. 109=I.L.R. 34 All. 296 (P.C.). 281, 282, 591, 592
Bamapada *v.* Ramnath Mandal, (1935) 40 C.W.N. 146 .. 645
Bapiraju *v.* Sreeramulu, (1934) 40 L.W. 588 .. 248
Baron de Bode's Case, (1838) 6 Dowling's Reports, 776 at 792 .. 214
Baroni *v.* Secretary of State for India, (1929) I.L.R. 8 Rang. 215 .. 521, 535
Bassu Kuar *v.* Dhum Singh, (1888) L.R. 15 I.A. 211=I.L.R. 11 All. 47 (P.C.) .. 671
Bayyan Naidu *v.* Suryanarayana, (1912) 23 M.L.J. 543=I.L.R. 37 Mad. 70 at 73 (F.B.) .. 238
Bell *v.* National Provincial Bank of England, Ltd., (1904) 5 I.T.C. 1 .. 627, 628, 629, 630
Bhabi Dutt *v.* Ramalalbyamal, A.I.R. 1934 Rang. 303 .. 678
Bhagwati Pande *v.* Badri Pande, (1931) I.L.R. 54 All. 171 .. 16
Bhavathradan *v.* Rama, (1883) I.L.R. 7 Mad. 99 .. 331
Bhola Ram & Sons, Ltd. *v.* The Crown, (1934) 15 Lah. 501 (S.B.) .. 111
Bhubaneswari Debi *v.* Nilcomul Lahiri, (1885) L.R. 12 I.A. 137 .. 70
Bhupathi Raju *v.* Subba Rao, (1931) 62 M.L.J. 472=I.L.R. 55 Mad. 646. 93
Bilas Kunwar *v.* Desraj Ranjit Singh, (1915) 29 M.L.J. 335=L.R. 42 I.A. 202=I.L.R. 37 All. 557 (P.C.) .. 693
In re Bik, (1884) I.L.R. 7 Mad. 390 .. 730, 732
Billimoria *v.* Mrs. Desouza, (1926) I.L.R. 8 Lah. 549 at 551 .. 221

PAGE.

Bimalacharan Batabyal *v.* Trustees for the Indian Museum, (1929) I.L.R. 57 Cal. 231 .. 521, 535
Bishambar Das *v.* Ismail, A.I.R. 1933 Lah. 1029 .. 552
Blest *v.* Brown, (1862) 4 De. G. F. and J. 367 at 376=45 E.R. 1225 .. 145
Bobba Padmanabhudu *v.* Bobba Buchamma, (1918) 35 M.L.J. 144 .. 45
Booban Moyee Debia *v.* Ram Kishore Acharjee Chowdhry, (1865) 10 M.I. A. 279 at 310. 66, 68, 69, 70
Brij Narain *v.* Mangal Prasad, (1923) 46 M.L.J. 23=L.R. 51 I.A. 129 =I.L.R. 46 All. 95 (P.C.) .. 284
Brindabun Chandra Kurmokar *v.* Chandra Kurmokar, (1885) I. L. R. 12 Cal. 140 .. 197
Broken Hill Proprietary Co., Ltd. *v.* Broken Hill Municipal Council, (1926) A.C. 94 .. 235, 239
Bryant Powis and Bryant *v.* La Banque du Peuple Bryant: Powis and Bryant *v.* Quebec Bank, (1893) A.C. 170 .. 26
Burma Oil Co. *v.* Ma Tin, (1929) I.L.R. 7 R. 505 .. 257, 260
Byramji Bomanji *v.* Official Assignee, Bombay, A.I.R. 1936 Bom. 130 .. 639

C

Chairman, Municipal Council, Chidambaram *v.* Tirunarayana Aiyangar, (1927) 55 M.L.J. 566=I.L.R. 51 Mad. 876 at 884 .. 277
Chakrapani Padhi *v.* Krishno Naiko, (1925) 23 L.W. 757 (1) .. 661
Chappan *v.* Moidin Kutti, (1898) 8 M.L.J. 231=I.L.R. 22 Mad. 68 at 80 (F.B.) .. 456, 459
Chandaba *v.* Kuver Saheb Bapu Saheb, (1893) I.L.R. 18 Bom. 464 .. 149
Chandrika Baksh *v.* Indar Bikaram Singh, (1916) I.L.R. 38 All. 440 (P.C.). 73
Chandrika Ram Kahar *v.* King-Emperor, (1922) I.L.R. 1 Pat. 401 .. 604
Chellapallee Case, (1901) 10 M.L.J. 294=L.R. 27 I.A. 151=I.L.R. 24 Mad. 147 (P.C.) .. 429
Chengalvaraya Mudaliar *v.* Commissioner of Income-tax, Madras, (1934) 7 I.T.C. 323. 184, 185, 187
Chenna Reddi *v.* Pedda Obi Reddi, (1909) 19 M.L.J. 388=I.L.R. 32 Mad. 416 (F.B.) .. 609
Chet Singh *v.* Gajar Singh, A.I.R. 1931 Lah. 74 .. 645
Chettiappa Chettiar and others *v.* The Commissioner of Income-tax, Madras, (1929) 31 L.W. 215=A.I.R. 1930 Mad. 119=4 I.T.C. 188 .. 360
E. M. Chettiar Firm *v.* Commissioner of Income-tax, Burma, Shrinivasan's I.T.C., Vol. 4, pp. 119 and 120 .. 203
Chhotey Lal *v.* Collector of Moradabad, (1921) L.R. 49 I.A. 375=I.L.R. 44 All. 514 (P.C.) .. 480, 482
Chhotey Lal *v.* Ganpat Rao, (1934) I.L.R. 57 All. 176 (F.B.) .. 284
Chidambaram Pillai *v.* Veerappa Chettiar, (1917) 6 L.W. 640 .. 448
Chiman Lal *v.* Hari Chand, (1913) L. R. 40 I. A. 156=I. L. R. 40 Cal. 879 (P.C.) .. 66
Chinna Mummidi Royal *v.* Raja Somasekara Chikka Royal, A.I.R. 1929 Mad. 783 .. 300
Chinnammal *v.* Madarsa Rowther, (1903) 14 M.L.J. 343=I.L.R. 27 Mad. 480 .. 740
Chinnaswamy Kavirayar *v.* Periathambi Butler, A.I.R. 1929 Mad. 811 .. 300
Chinnayya Naidu *v.* Srinivasa Naidu, (1934) 67 M.L.J. 912 .. 551
Choturam *v.* Ganesh, (1901) 3 Bom.L.R. 132 .. 178
Christie *v.* Commissioners of Inland Revenue and Phillips *v.* Commissioners of Inland Revenue, (1866) and (1867) L.R. 2 Ex. Cases 46 and 399 .. 176
Chundi Dutt Jha *v.* Pudmanund Singh Bahadur, (1895) I.L.R. 22 Cal. 928. 349
Coats *v.* Inland Revenue Commissioner, (1897) 2 Q.B. 423 .. 112

PAGE.

Collector of Gorakhpur *v.* Ram Sundar Mal, (1934) 67 M.L.J. 274=L.R. 61 I.A. 286=I.L.R. 56 All. 468 (P.C.). 429, 430, 716, 717
Commissioners of Income-tax *v.* Pamsel, (1891) A.C. 531 at 568 .. 204, 212
Commissioner of Income-tax *v.* Lakshminarayan, (1935) I.L.R. 59 Bom. 618. 314, 316, 320
Commissioner of Income-tax, Bihar and Orissa *v.* Maharajadhiraj Kumar Visheshwar Singh, (1935) I.L.R. 14 Pat. 785 (S.B.) .. 718
Commissioner of Income-tax, Bihar and Orissa *v.* Maharajadhiraj of Dhurbhanga, (1935) 69 M.L.J. 474=L.R. 62 I.A. 215=I.L.R. 14 Pat. 623 (P.C.) .. 360
Commissioner of Income-tax, Bombay *v.* The Bombay Trust Corporation, Ltd., (1929) 58 M.L.J. 197=L.R. 57 I.A. 49=I.L.R. 54 Bom. 216 (P.C.) .. 206
The Commissioner of Income-tax, Madras *v.* Raja of Parlakimidi, (1925) 2 I.T.C. 104 .. 185
Commissioner of Income-tax *v.* Zamindar of Chemudu, (1932) I.L.R. 14 Lah. 255 .. 717
Corner *v.* Shew, (1838) 3 M. & W. 350=150 E.R. 1179 .. 451
Cousins *v.* Sun Life Assurance Society, (1933) 1 Ch. 126 .. 737
Chowdhury Chintamun Singh *v.* Nowlukho Konwari, (1875) L.R. 2 I.A. 263=I.L.R. 1 Cal. 153 (P.C.) .. 429
Currimbhoy & Co., Ltd. *v.* Creet, (1932) 64 M.L.J. 103=L.R. 60 I.A. 297=I.L.R. 60 Cal. 980 (P.C.) .. 693

D

Darling, *In re,* (1888) L.R. 39 Ch. D. 208 .. 291, 295
Daulat Ram *v.* Mehr Chand, (1887) L.R. 14 I.A. 187=I.L.R. 15 Cal. 70 (P.C.) .. 281
Re Dawson and Jenkin's Contract, (1904) L.R. 2 Ch.D. 219 at 222 .. 481
Debendranath Mandal *v.* Emperor, (1930) I.L.R. 58 Cal. 879 .. 474
Debendra Nath Roy *v.* Kartic Prasad Das, (1928) I.L.R. 55 Cal. 1210 .. 264
The Delhi Cloth and General Mills *v.* Income-tax Commissioner, Delhi, (1927) 53 M.L.J. 819=L.R. 54 I.A. 421=I.L.R. 9 Lah. 284 (P.C.) .. 107
Derry *v.* Peek, (1889) L.R. 14 A.C. 337 .. 434, 438
Devi Neni Pattayya *v.* Kandukuri Kotiah, (1916) 5 L.W. 151 .. 40
Dhanraj Joharmal *v.* Soni Bai, (1925) 49 M.L.J. 173=L.R. 52 I.A. 231=I.L.R. 52 Cal. 482 (P.C.) .. 72
Dinbai Hormasji Mirapurwala *v.* Bamanshaji, (1933) I.L.R. 58 Bom. 513. 738
Donepudi Subramaniyam *v.* Nunc Narasimham, (1928) 56 M.L.J. 489 .. 136
Dottie Karan *v.* Lachmi Prasad Sinha, (1930) 60 M.L.J. 441=L.R. 58 I.A. 58 at 66=I.L.R. 10 Pat. 481 (P.C.) .. 481
Doulat Ram *v.* Mehr Chand, (1887) L.R. 14 I.A. 187=I.L.R. 15 Cal. 70 (P.C.) .. 18
Dundappa *v.* Bhimava, (1920) I.L.R. 45 Bom. 557 .. 32
Duraiswamy *v.* Nagaswami, A.I.R. 1929 Mad. 898 .. 247
Dwarka Das *v.* Krishan Kishore, (1921) I.L.R. 2 Lah. 114 at 117, 118 .. 229
Dwijendra Nath Mullick *v.* Gopiram Gobindaram, (1925) I.L.R. 53 Cal. 51. 418, 495

E

Elumalai Naicker *v.* Kuppammal, (1929) 58 M.L.J. 623=I.L.R. 53 Mad. 716 .. 152, 153
Emperor *v.* Aijaz Husain, (1916) I.L.R. 38 All. 506 .. 180
Emperor *v.* Ambaji Dhakya Katkari, (1928) I.L.R. 52 Bom. 257 .. 336
Emperor *v.* Gulam Ahamad, (1929) 118 I.C. 224 .. 75
Emperor *v.* Husain Khan, (1916) I.L.R. 39 All. 293 .. 335

PAGE.

Emperor *v.* Nangal Mali, (1905) I.L.R. 41 Cal. 601, 612 .. 156
Emperor *v.* Sadhu Charan Das, (1921) I.L.R. 49 Cal. 600 .. 604
Emperor *v.* Sardar Khan, (1916) I.L.R. 41 Bom. 27 .. 748
Emperor *v.* Sesha Rao, A.I.R. 1926 Bom. 62 .. 75
Eshugbayi Eleko *v.* Government of Nigeria, (1931) A.C. 662 at 671 .. 518
Eusuffzeman *v.* Sanchia Lal Nahata, (1915) I.L.R. 43 Cal. 207 .. 300
Ex parte Chinery, (1884) 12 Q.B.D. 342 .. 348
Ex parte Hilbert, (1805) 11 Ves. Jun. 397=32 E.R. 1141 .. 294
Ex parte Marton, (1805) 11 Ves. Jun. 397=32 E.R. 1140 .. 293
Ex parte Smyth, (1818) 1 Swans. 337=36 E.R. 412 .. 80
Ex parte Wier, (1871) 6 Ch. A. 875 at 879 .. 564

F

Fakir Chand Mandal *v.* Daiba Charan Parni, (1927) 54 Cal. 1052 .. 409
Faqir Baksh *v.* Murli Dhar, (1931) 61 M.L.J. 261=L.R. 58 I.A. 75=I.L.R. 6 Luck. 197 (P.C.) .. 504
Farhall *v.* Farhall, (1871) 7 Ch. A. 123 .. 451
First Pittapur Case, (1899) 9 M.L.J. Sup. 1=L.R. 26 I.A. 83=I.L.R. 22 Mad. 383 (P.C.). 428, 429, 712
Fischer *v.* Secretary of State for India in Council, (1896) I.L.R. 19 Mad. 292 at 297 .. 699
Fischer *v.* Secretary of State for India in Council, (1898) L.R. 26 I.A. 16=I.L.R. 22 Mad. 270 (P.C.) .. 521
Fitzholmes *v.* Bank of Upper India, Ltd., (1926) 52 M.L.J. 366=L.R. 54 I.A. 52=I.L.R. 8 Lah. 253 (P.C.) .. 411, 413
In re Fleetwood's Policy, (1926) 1 Ch. 48 .. 737
Flower *v.* Sadler, (1882) 10 Q.B.D. 572 at 576 .. 418, 495
Forbes *v.* Meer Mahomed Tuquee, (1870) 13 M.I.A. 438 .. 698
Frost, *In re*, (1870) L.R. 5 Ch. App. 699 .. 292

G

Gajadhar Singh *v.* Kishan Jiwan Lal, (1917) I.L.R. 39 All. 641 .. 413
Ganapathi Bhatta, *In re*, (1911) 24 M.L.J. 463=I.L.R. 36 Mad. 308. 335, 336, 337
Ganesha Row *v.* Tuljaram Row, (1913) 25 M.L.J. 150=L.R. 40 I.A. 132=I.L.R. 36 Mad. 295 at 303 (P.C.) .. 386
Gangayya *v.* Mahalakshmi, (1886) I.L.R. 10 Mad. 90 .. 47
Garuda Sanyasayya *v.* Nerella Murthenna, (1918) 35 M.L.J. 661 .. 233
Gaya Prasad *v.* Murlidhar, (1927) I.L.R. 50 All. 137 at 141 .. 246
Gendan Singh *v.* Fitzholmes, (1926) 51 M.L.J. 781=L.R. 53 I.A. 197=I.L.R. 6 Pat. 24 (P.C.) .. 411, 413
Ghanshyam Das *v.* Ragho Singh, (1930) I.L.R. 10 Pat. 234 .. 307
Girdharee Lal *v.* Kantoo Lal, (1874) L.R. 1 I.A. 321 at 331 (P.C.) .. 282
Girhi Rani Misrani *v.* Chandra Lal Kanth, (1912) 17 C.W.N. 62 .. 690
Gnanada *v.* Nalini Bala Debi, (1925) 43 C.L.J. 146 .. 240
Gopayya, *In re*, (1927) 55 M.L.J. 27=I.L.R. 51 Mad. 866 .. 277
Gordon *v.* Roe, (1858) 8 El. and Bl. 1065=120 E.R. 396 at 405 .. 146
Gotipati Subban *v.* Gotipati Narasamma, (1914) 27 M.L.J. 486 .. 228, 230
Gould *v.* Stuart, (1896) A.C. 575. 518, 521, 535
Govinddoss Krishnadoss *v.* Gokuldoss Govardhandoss, (1928) 55 M.L.J. 132. 98
Govinda Pillai *v.* Thayammal, (1904) 14 M.L.J. 209=I.L.R. 28 Mad. 57 .. 394, 395
Govindaswami Mudaliar *v.* Rasu Mudaliar, (1934) 68 M.L.J. 41=I.L.R. 58 Mad. 781 at 786 .. 661
Greeman Singh *v.* Wahari Lall Singh, (1881) I.L.R. 8 Cal. 12 .. 47
Gurmallappa *v.* Mallappa Marthandappa, (1919) I.L.R. 44 Bom. 574 .. 387
Gurusami Nadar *v.* Gopalaswamy Odayar, (1919) 36 M.L.J. 568=I.L.R. 42 Mad. 629 .. 552

PAGE.

Guruvappa *v.* Thimma, (1887) I.L.R. 10 Mad. 316 .. 229
Guruvayya *v.* Dattatraya, (1903) I.L.R. 28 Bom. 11 .. 666
Gyanendra Nath Basu *v.* Rani Nihalo Bibi, (1910) I.L.R. 32 All. 404 .. 229

H

Hadjee Abdoollah Reasut Hossein *v.* Hadjee Abdoollah, (1876) L.R. 3 I.A. 221=I.L.R. 2 Cal. 131 (P.C.) .. 565
Hanifa Bai *v.* Haji Siddick Bui Meanji Sait, (1906) 17 M.L.J. 447=I.L.R. 30 Mad. 547 .. 149
Hanooman Prasad's Case, (1856) 6 M.I.A. 393 at 421 .. 282
Hanoomanpersaud *v.* Mussumut Babooee, (1856) 6 M.I.A. 393 .. 425, 426
Haribans Prasad *v.* National Sugar Mills, Ltd. (In liquidation), (1932) I.L.R. 14 Lah. 68 .. 221
Harnet *v.* Bond, (1925) A.C. 669 .. 613
Harnet *v.* Bond, (1924) 2 K.B. 517 .. 613
Harrison *v.* Kirk, (1904) A.C. 1 at 5 .. 639
Hazari Mall Babu *v.* Abaninath Adhurjya, (1912) 17 C.W.N. 280 at 284, 285 .. 315
Hemkore *v.* Masamalli, (1902) I.L.R. 26 Bom. 782 .. 264
Hoystead *v.* Commissioner of Taxation, (1926) A.C. 155 .. 239
Hughes *v.* Bank of New Zealand, (1936) 3 All. E.L.R. 975 .. 362
Hury Doyal *v.* Din Doyal, (1883) I.L.R. 9 Cal. 479 .. 257, 261

I

Immudipattam Thirugnana Kondama Naik *v.* Periya Dorasami, (1900) L.R. 28 I.A. 46=I.L.R. 24 Mad. 377 (P.C.) .. 688
Imperator *v.* Akidulla, (1911) 15 I.C. 808 .. 75
Indar Pal *v.* Imperial Bank, (1915) I.L.R. 37 All. 214 .. 246
Indra Chandra Mukherjee *v.* Sirish Chandra Banerjee, (1913) I.L.R. 40 Cal. 537 .. 15
Inland Revenue Commissioners *v.* Duke of Westminster, (1936) A.C. 1 at 16 .. 315
International Cable Company, (1892) 66 L.T. 253 .. 513
In re Ioakimidis' Policy Trusts: Ioakimidis *v.* Hartcup, (1925) 1 Ch. 403 .. 737
Ipoh case, Somasundaram Chettiar *v.* Commissioner of Income-tax, Madras, (1927) 54 M.L.J. 436=2 I.T.C. 505 .. 361
Iswari Prasad Singh *v.* Raghubans Lal, (1934) I.L.R. 13 Pat. 379 .. 412
Izzat-un-nisa Begum *v.* Pertab Singh, (1909) 19 M.L.J. 682=L.R. 36 I.A. 203=I.L.R. 31 All. 583 (P.C.) .. 590

J

Jadu Nath Singh *v.* Thakur Sita Ramji, (1917) L.R. 44 I.A. 187 .. 173
Jagadamba Kumari *v.* Wazir Narain Singh, (1922) 44 M.L.J. 503=L.R. 50 I.A. 1=I.L.R. 2 Pat. 319 (P.C.). 709, 713, 714, 718
Jagannatha Rao *v.* Viswesam, (1924) 46 M.L.J. 590=I.L.R. 47 Mad. 621 at 624 .. 246
Jagat Narain *v.* Mathura Das, (1928) I.L.R. 50 All. 969 (F.B.) .. 427
Jai Berham *v.* Kedar Nath Marwari, (1922) 44 M.L.J. 735=L.R. 49 I.A. 351=I.L.R. 2 Pat. 10 (P.C.) .. 258
Jambudass Devidas Chawre *v.* Commissioner of Income-tax, Central Provinces, Shrinivasan's, I.T.C.; Vol. III; p. 459 .. 203
Jambu Pershad *v.* Muhammad Aftab Khan, (1914) 28 M.L.J. 577=L.R. 42 I.A. 22 at 29=I.L.R. 37 All. 49 (P.C.) .. 481, 482
Janaki Ammal *v.* Narayanasami Aiyar, (1916) 31 M.L.J. 225=L.R. 43 I.A. 207=I.L.R. 39 Mad. 634 (P.C.) .. 46

PAGE.

Janaki Prasad Singh *v.* Dwaraka Prasad Singh, (1913) 25 M.L.J. 34=L.R. 40 I.A. 170=I.L.R. 35 Cal. 391 (P.C.) .. 713
Janakiram Chetty *v.* Nagamony Mudaliar, (1925) 50 M.L.J. 413=I.L.R. 49 Mad. 98 .. 314, 315
Janardhan *v.* Anant, (1908) 32 Bom. 386 .. 56
Janki Prasad *v.* Karamat Hussain, A.I.R. 1931 All. 674 .. 199
Jawahar Singh *v.* Parduman Singh, (1932) I.L.R. 14 Lah. 399 .. 247
Jeremiah *v.* Vas, (1911) 22 M.L.J. 73=I.L.R. 36 Mad. 457 .. 76
Jiwan Mal *v.* Jamna Das, (1910) 10 I.C. 822 .. 65
Jogarao *v.* Venkamma, A.I.R. 1927 Mad. 497 .. 228
Jones *v.* Merionethshire Permanent Benefit Building Society, (1892) 1 Ch. D. 173 .. 493

K

Kadiresan *v.* Maung San Ya, A.I.R. 1933 Rang. 87 .. 466
Kali Charan *v.* Hirdai Narain, A.I.R. 1935 Pat. 24 at 28, 29 .. 228
Kalyan Singh *v.* Jagan Prasad, (1915) I.L.R. 37 All. 589 .. 302
Kameswaramma *v.* Venkatasubba Rao, (1915) 27 M.L.J. 112=I.L.R. 38 Mad. 1120 .. 247, 248
Kandappa Achari *v.* Singarachari, (1926) 25 L.W. 299 .. 40
Kanhaiya Lal Sahu *v.* Mussammat Suga Kuer, (1925) I.L.R. 4 Pat. 824. 65
Kanniappa Mudaliar *v.* Secretary of State for India, (1935) 69 M.L.J. 728 =I.L.R. 59 Mad. 107 .. 733, 734
Karmali Abdulla *v.* Karimji Jeevanji, (1914) 28 M.L.J. 515=L.R. 42 I.A. 48=I.L.R. 39 Bom. 261 (P.C.) .. 550, 557
Karri Bapanna *v.* Yerramma, (1923) 45 M.L.J. 324 .. 118
Kasturi *v.* Lote Major, (1920) 56 I.C. 952. 29, 30, 31
Kathama Nachiar *v.* Dorasinga Tevar, (1875) L.R. 2 I.A. 169 (P.C.) .. 45
Kelu Nair *v.* Valia Thamburatti, (1922) 16 L.W. 310. 326, 328, 329
Kerala Varma *v.* Chadayan Kutti, (1891) I.L.R. 15 Mad. 181 .. 91
Kesavuloo *v.* The Official Receiver, West Tanjore, (1936) 71 M.L.J. 336. 465, 466, 467
Kesiram Narasimhalu *v.* Narasimhalu Patnaidu, (1906) 16 M.L.J. 514= I.L.R. 30 Mad. 126 (F.B.) .. 40
Khair-un-nissa Bibi *v.* Oudh Commercial Bank, Ltd., (1929) I.L.R. 51 All. 640 .. 412, 413
Khushalchand Lalchand *v.* Bai Mani, (1886) I.L.R. 11 Bom. 247 .. 197
Kirby *v.* Simpson, (1854) 10 Ex. 358=156 E.R. 482 .. 583, 585
Kishan Sarup *v.* Brijraj Singh, (1929) I.L.R. 51 All. 932 .. 246, 247
Knight *v.* Knight, (1840) 3 Beav. 148 at 172=49 E.R. 58 .. 12
Kodangi *v.* Emperor, (1931) 61 M.L.J. 860 .. 156
Koganti Veerayya *v.* Narra Sreesilam, (1927) 110 I.C. 47 .. 308, 309
Koraga Gowda *v.* Somappa Gowda, (1932) 36 L.W. 793 .. 741
In the matter of Korapulu *v.* Monappa and others, (1882) I.L.R. 5 Mad. 160 .. 121
Koti Reddi *v.* Subbiah, (1918) 34 M.L.J. 494=I.L.R. 41 Mad. 792 (F.B.). 585
Krishan Kishore *v.* Commissioner of Income-tax, (1932) I.L.R. 14 Lah. 255 .. 314, 321
Krishna Aiyar *v.* Krishnaswami Aiyar, (1900) I.L.R. 23 Mad. 597. 228, 549, 550
Krishna Aiyar *v.* Muthulakshmi Ammal, (1933) 66 M.L.J. 342 .. 333
Krishna Chettiar *v.* Nagamoni Ammal, (1915) I.L.R. 39 Mad. 915 .. 551
Krishnamachariar *v.* Chellammal, A.I.R. 1928 Mad. 561 .. 365
Krishnanand Nath Khare *v.* Raja Ram Singh, (1922) I.L.R. 44 All. 393 at 396 .. 547, 556

PAGE.

Krishna Row *v.* The Collector of Kistna, (1914) 26 M.L.J. 210 .. 323
B. Krishna Rau *v.* Lakshmana Shanbhogue, (1881) I.L.R. 4 Mad. 302 .. 670
Krishnayya *v.* The Bellary Municipal Council, (1891) I.L.R. 15 Mad. 292. 598
Krishnaswamy Konan *v.* Ramaswamy Aiyar, (1899) 9 M.L.J. 127=I.L.R. 22 Mad. 519 .. 246, 248
Kumara Goundan *v.* Thevaraya Reddi, (1924) 48 M.L.J. 616 .. 644
Kumaran Uni Achan *v.* Kunhikrishnan Nair, (1923) 75 I.C. 814 .. 670
Kumarappa Chettiar *v.* Adaikkalam Chetty, (1931) 62 M.L.J. 141=I.L.R. 55 Mad. 483 at 491 .. 592
Kunhi Sou *v.* Mulloli Chathu, (1912) 23 M.L.J. 695=I.L.R. 38 Mad. 86. 81

L

Lakshmana Aiyar *v.* Palaniappa Chettiar, (1935) 69 M.L.J. 479 .. 90
Lakshmanan Chettiar *v.* The Commissioner of Income-tax, Madras, (1929) 58 M.L.J. 68=4 I.T.C. 200 .. 360
Lakshmana Chettiar *v.* Muthu Chellia Goundan, (1934) 68 M.L.J. 104 .. 229
Lakshmi Amma *v.* Janamajayan Nambiar, (1894) 4 M.L.J. 183 (F.B.). 2, 6, 7
Lakshmi Ammal, *In re,* (1925) 49 M.L.J. 608 .. 4
Lakshmi Naranappa *v.* Meloth Raman Nair, (1920) I.L.R. 26 Mad. 540 .. 80
Lalla Sheo Churn Lal *v.* Ramnandan Dobey, (1894) I.L.R. 22 Cal. 8 .. 118
Lal Ram Singh *v.* Deputy Commissioner, (1923) 47 M.L.J. 260=L.R. 50 I.A. 265=I.L.R. 45 All. 596 (P.C.) .. 315, 319
Latchamma *v.* Appanna, (1921) 41 M.L.J. 386 .. 49
Lemm *v.* Mitchell, (1912) A.C. 400 .. 107
Lock *v.* Ashton, (1848) 12 Q.B. 871 .. 613
Lodai Mollah *v.* Kally Das Roy, (1881) I.L.R. 8 Cal. 238 .. 568
Lutful Huq *v.* Subhudin Pattuck, (1881) 8 Cal. 248 .. 409

M

Madam Pillai *v.* Badrakali Ammal, (1922) 42 M.L.J. 410=I.L.R. 45 Mad. 612 (F.B.). 689, 695, 696, 700
Made Gouda *v.* Chenne Gouda, (1925) 49 M.L.J. 150 .. 690
Mahanth Singh *v.* U Aye, (1936) I.L.R. 14 Rang. 336 .. 450
Maharaja of Bobbili *v.* Zamindar of Chundi, (1910) 21 M.L.J. 593=I.L.R. 35 Mad. 108 .. 20
Maharajah of Jeypore *v.* Ramamurthy, (1933) 65 M.L.J. 684. 235, 239, 240
Maharajah of Jeypore *v.* Rukmini Pattamahadevi Garu, (1918) 36 M.L.J. 543=L.R. 46 I.A. 109=I.L.R. 42 Mad. 589 (P.C.) .. 697
Maharajah of Kolhapur *v.* Sundaram Aiyar, (1924) I.L.R. 48 Mad. 1 at 125 to 129 .. 272
Maharajah of Vizianagaram *v.* The Collector of Vizagapatam, (1914) 27 M.L.J. 278=I.L.R. 38 Mad. 1128 at 1130 .. 697
Mahomed Ibrahim Hossain Khan *v.* Ambika Prasad Singh, (1912) 22 M.L.J. 468=L.R. 39 I.A. 68=I.L.R. 39 Cal. 527 (P.C.) .. 405
Mahomed Shamsul *v.* Shewukram, (1874) L.R. 2 I.A. 7 .. 272
Makudam Mohammad *v.* Mohammad Sheik Abdul Kadir, (1936) 71 M.L.J. 281 .. 675
Mallesam Naidu *v.* Jugala Panda, (1899) 10 M.L.J. 34=I.L.R. 23 Mad. 292 (F.B.) .. 549
Man Chand *v.* The Crown, (1924) I.L.R. 5 Lah. 324 .. 604
Manaji Rajuji *v.* Khandoo Baloo, (1911) I.L.R. 36 Bom. 279 .. 730, 731
Manavala Goundan *v.* Kumarappa Reddy, (1907) 17 M.L.J. 313=I.L.R. 30 Mad. 326 .. 636
Maneckji Pestonji *v.* Wadilal Sarabhai & Co., (1926) 51 M.L.J. 1=L.R. 53 I.A. 92=I.L.R. 50 Bom. 360 (P.C.) .. 112

PAGE.

Mangalathammal *v.* Narayanaswamy Aiyar, (1907) 17 M.L.J. 250=I.L.R. 30 Mad. 461 .. 239, 240
Manmatha Nath Biswas *v.* Rohilli Moni Dasi, (1904) I.L.R. 27 All. 406 .. 47
Maqbul Ahmad *v.* Onkar Pratab Narain Singh, (1935) 68 M.L.J. 665=L.R. 62 I.A. 80=I.L.R. 57 All. 242 (P.C.) .. 309
Maqbul Ahmad *v.* Pratab Narain Singh, (1935) 68 M.L.J. 665=L.R. 62 I.A. 80=I.L.R. 57 All. 242 at 248 (P.C.) .. 264
Maroof Sahib *v.* Ayyakannu Naicker, (1934) 68 M.L.J. 755=I.L.R. 58 Mad. 1051 .. 740
Maskell *v.* Horner, (1915) 3 K.B. 106 .. 497
Mausa Puri *v.* Harbaghat Puri, (1916) 37 I.C. 172 .. 149, 150
Maxse's Case, (1919) 1 K.B. 647 .. 361
Messrs. Best & Co. *v.* Commissioner of Income-tax, Madras, (1932) 63 M.L.J. 15=I.L.R. 55 Mad. 832=6 I.T.C. 92 .. 627, 629
Milroy *v.* Lord, (1862) 7 L.T. Rep. 178 .. 13
Minakshi *v.* Muniandi Panikkar, (1914) 27 M.L.J. 353=I.L.R. 38 Mad. 1144. 29, 30, 31
Mina Kumari Bibi *v.* Surendra Narain Chakravarty, (1909) 3 I.C. 12 .. 613
Mitra *v.* Corporation of Royal Exchange Assurance, A.I.R. 1930 Rang. 259 .. 728, 731
Mohammad Zaki *v.* The Municipal Board of Mainpuri, (1918) 16 A.L.J. 440. 728, 731
Mohendra Nath Sahu *v.* Emperor, A.I.R. 1934 Pat. 411 .. 336
Mohideen Abdul Kadir *v.* Emperor, (1903) I.L.R. 27 Mad. 238 .. 155
Monmotho Nath Mukerjee *v.* Puran Chand Nahatta, (1925) 29 C.W.N. 539 at 552 .. 481, 482
Maria Pillai *v.* Gopalakrishna Aiyar, (1928) M.W.N. 633 .. 501
Moriarty *v.* Regent's Garage Company, (1921) 1 K.B. 423 at 447 .. 514
Morrell *v.* Cowen, (1887) 6 Ch.D. 173 .. 54
Moti Lal *v.* Karrab-ul-din, (1897) L.R. 24 I.A. 170=I.L.R. 25 Cal. 179 (P.C.) .. 578
Mottayya Padayachi *v.* Rajagopalan, (1936) M.W.N. 547 at 548. 465, 466, 467
Muddun Gopal Thakur *v.* Ram Buksh Pandey, (1864) 6 W.R. 71 .. 314, 315
Muhammad Ewaz *v.* Birj Lal, (1877) L.R. 4 I.A. 166 at 171=I.L.R. 1 All. 465 (P.C.) .. 482
Muhammad Hussain *v.* Baba Sah, A.I.R. 1926 Mad. 336 .. 199
Muhammad Sadik *v.* Muhammad Jan, (1888) I.L.R. 11 All. 91 (F.B.) .. 6
Muhammad Sheriff *v.* Sayyed Kasim, A.I.R. 1933 Mad. 635 .. 35, 36
Muhammad Sharif Khan *v.* Muhammad Moazzum Ali Khan, (1922) 79 I.C. 464 .. 552
Mujibunnissa *v.* Abdul Rahim, (1900) L.R. 28 I.A. 15 .. 168
The Municipal Council, Tuticorin *v.* Ralli Brothers, (1933) 67 M.L.J. 566 at 569 to 573 .. 497
Murugesam Pillai *v.* Manickavasaka Desika Gnana Sambanda Pandarasannadhi, (1916) 32 M.L.J. 565=L.R. 44 I.A. 117=I.L.R. 40 Mad. 402 (P.C.). 552
Mussumat Bhagbuti Dube *v.* Chowdry Bholanath Thakoor, (1875) L.R. 2 I.A. 256 .. 272
Muthammal *v.* Sivakami Ammal, (1925) 21 L.W. 606 .. 233
Muthu Chettiar *v.* Narayanan Chettiar, (1927) 55 M.L.J. 274=I.L.R. 51 Mad. 672 .. 457
Muthukumaraswamy Mudaliar *v.* Harinarayana Mudaliar, (1927) 53 M.L.J. 601 .. 45
Muttayan Chetti *v.* Sivagiri Zamindar, (1879) I.L.R. 3 Mad. 370 at bottom of p. 378 .. 19
Muttayan Chetti *v.* Zamindar of Sivagiri, (1882) L.R. 9 I.A. 128=I.L.R. 6 Mad. 1 (P.C.) .. 19, 20
Mutyala Virayya *v.* Parthasarathy Appa Rao, (1933) 65 M.L.J. 417=I.L.R. 57 Mad. 190 .. 284

PAGE.

N

Nachiappa Chetty *v.* Dakshinamurthy Servai, (1915) 17 M.L.T. 232=28 I.C. 345 .. 548, 557
Naganna *v.* Pattabhiramayya, (1927) 54 M.L.J. 595=51 Mad. 245 .. 636
Nagappa Bandappa *v.* Gurushantappa Shankrappa, (1932) I.L.R. 57 Bom. 388 .. 410
Nagar Mal *v.* Ram Chand, (1910) I.L.R. 33 All. 240 .. 256, 260
Nagendranath Dey *v.* Suresh Chandra Dey, (1932) 63 M.L.J. 329=L.R. 59 I.A. 283=I.L.R. 60 Cal. 1 at 5 (P.C.). 409, 455, 460
Nanak Ram *v.* Mehin Lal, (1877) I.L.R. 1 All. 487 .. 421
Naini Mal *v.* Emperor, (1923) 74 I.C. 708 .. 129
Najimunnessa Bibi *v.* Nacharuddin Sardar, (1923) I.L.R. 51 Cal. 548 at 557 .. 136, 578
Nanomi Babuasin *v.* Modun Mohun, (1885) L.R. 13 I.A. 1=I.L.R. 13 Cal. 21 at 35 (P.C.) .. 283
Narasimha Rao *v.* Gangaram, (1908) 18 M.L.J. 590=I.L.R. 31 Mad. 431. 411
Narasimhulu Naidu *v.* Naina Pillai, A.I.R. 1929 Mad. 7 .. 495
Narayana Ananga *v.* Madhava Deo, (1883) L.R. 20 I.A. 9=I.L.R. 16 Mad. 268 (P.C.) .. 57
Narayanaswamy Naidu *v.* Secretary of State for India, (1912) 24 M.L.J. 36 .. 161
Narayan *v.* Basanna, (1918) 52 I.C. 770 .. 692
Narayan Babaji *v.* Nana Manohar, (1870) 7 B.H.C.R. 153 at 176 .. 592
Narayan Govind Ok *v.* Ganesh Atmaram Fadke, (1870) 7 B.H.C.R.A.C.J. 118 .. 472
Narayani Amma *v.* Kunchukutti Amma, (1916) 32 M.L.J. 541 .. 327
Narayan Pundlik *v.* Laxman Daji, (1927) I.L.R. 51 Bom. 784 .. 394
Narsing Sevak Singh *v.* Madho Das, (1882) I.L.R. 4 All. 274 .. 409, 410
Narunayya Chetti *v.* Tiruvengadathan Chetti, (1912) 24 M.L.J. 223 .. 31
Nataraja Naicken *v.* Ayyaswami Pillai, (1916) 32 M.L.J. 354. 550, 558, 559
Natesa Chetty *v.* Vengu Nachiar, (1909) 20 M.L.J. 20=I.L.R. 33 Mad. 102 .. 239
Nathalal Ramdas *v.* The Nadiad Municipality, (1922) I.L.R. 47 Bom. 306 .. 598
Newell *v.* Starkie, (1919) 2 Ir. Rep. 325 .. 584, 586
Nga Tha Yah *v.* F.N. Burn, (1868) 2 Beng. L. R. 91 (F.B.) .. 136
Nizam *v.* Babu Ram, (1933) I.L.R. 14 Lah. 730 .. 638
Nynam Veetil Mayan Kutti *v.* Valappilakath Kunhammad, (1917) 34 M.L.J. 167=I.L.R. 41 Mad. 641 .. 86, 87

O

Onslow *v.* Commissioners of Inland Revenue, (1890) 25 Q.B.D. 465 .. 348

P

P. & O. Steam Navigation Co. *v.* Secretary of State, (1861) 5 B.H.C.R. (App.) 1 .. 537
Padma Kumaree Debee *v.* J. Kishore Acharjee, (1879) I.L.R. 5 Cal. 615. 68
Padmakumari Debi Chowdhrani *v.* Court of Wards, (1881) I.L.R. 8 Cal. 302. 69
Pakirayya *v.* Kamasastri, A.I.R. 1933 Mad. 328 at 329 .. 137
In re. Palace Restaurants, Limited, (1914) 1 Ch. 492 at 500 .. 221
Palani Ammal *v.* Muthu Venkatachela Moniagar, (1924) 48 M.L.J. 83=L.R. 52 I.A. 83 at 86=I.L.R. 48 Mad. 254 (P.C.) .. 100
Palaniappa *v.* Deivasikamony, (1917) 33 M.L.J. 1=L.R. 44 I.A. 147=I.L.R. 40 Mad. 709 (P.C.) .. 426
Palaniappa Chettiar *v.* Alagan Chetti, (1921) L.R. 48 I.A. 539=I.L.R. 44 Mad. 740 (P.C.) .. 67

PAGE.

In re Pandharinath Pundlik, (1915) I.L.R. 40 Bom. 186 .. 129
Pandit Chandrika Prasad *v.* B. B. & C. I. Ry. Co., (1935) 68 M.L.J. 552 (P.C.) .. 693
Pandiyan *v.* Pandia Chinna Thambiar, (1920) 39 M.L.J. 529=I.L.R. 44 Mad. 1 .. 78
Parat Veetil Seethi *v.* Ambalath Veetil Kolathur, (1915) 32 I.C. 45 .. 661
Parbati Kumari Debi *v.* Jagadis Chander Dhabal, (1902) L.R. 29 I.A. 82=I.L.R. 29 Cal. 433 (P.C.). 713, 715, 718
Parker *v.* Wise, (1817) 6 M. and S. 239=105 E.R. 1232 .. 145, 146
Parshottam Ganpat *v.* Venichand Ganpat, (1920) I.L.R. 45 Bom. 754 .. 66
Parthasarathi *v.* Chinnakrishnan, (1882) I.L.R. 5 Mad. 304 .. 199, 239
Parthasarathy Ayyangar *v.* Rangaswamy Aiyangar, (1916) 4 L.W. 654 .. 89
Parton *v.* Williams, (1820) 3 B. & Ald. 330=106 E.R. 684 .. 582
Parvati *v.* Kisan Singh, (1882) I.L.R. 6 Bom. 567 at 569, 570 .. 578
Pattannayya *v.* Pattayya, (1925) 50 M.L.J. 215 .. 465
Payapa *v.* Appanna, (1898) I.L.R. 23 Bom. 327 .. 69
Peda Satyam *v.* Krishnamurthi, (1935) 68 M.L.J. 693=I.L.R. 58 Mad. 1045. 36
Peek *v.* Peek, (1869) 17 W.R. 1059 .. 168
Peninsular and Oriental Steam Navigation Company's case, (1868) 5 Bom. H.C.R. 1. 516, 517, 518
Periya Aiya Ambalam *v.* Shunmugasundaram, (1913) 26 M.L.J. 140=I.L.R. 38 Mad. 903 (F.B.) .. 692
Periaswamy Moopan, *In re,* (1930) I.L.R. 54 Mad. 75 .. 757
Periasami Mudaliar *v.* Seetharama Chettiar, (1903) 14 M.L.J. 84=I.L.R. 27 Mad. 243 (F.B.) .. 548
Pertab Narain Singh *v.* Subho Kooer, (1877) L.R. 4 I.A. 228 at 245 .. 167
Perumal *v.* Ramaswami Chetti, (1887) I.L.R. 11 Mad. 16 .. 218
Perumal Koundan *v.* Thirumalarayapuram Jananukoola Dhanasekhara Sanka Nidhi, (1917) 34 M.L.J. 421=I.L.R. 41 Mad. 624 .. 730, 731
Pharmaceutical Society *v.* London and Provincial Supply Association, (1880) L.R. 5 A.C. 857 at 861 .. 729
Phirozshaw Bomanjee *v.* Bai Goolbai, (1923) 47 M.L.J. 79=L.R. 50 I.A. 276=I.L.R. 47 Bom. 790 (P.C.) .. 82
Pichuvaiyangar *v.* Seshaiyangar, (1894) 5 M.L.J. 39=I.L.R. 18 Mad. 214 (F.B.) .. 609
Pollitt, *In re,* (1893) 1 Q.B. 455 at 457 .. 639
Ponnambala Pillai *v.* Sundarappier, (1897) 7 M.L.J. 240=I.L.R. 20 Mad. 354 at 356 .. 20
Porter, *In re,* (1925) 1 Ch. 746 at 751 .. 168
Premchand Indoji *v.* Gopalappa, (1923) 45 M.L.J. 689 .. 657
Profulla Kumar Basu *v.* Sm. Sorojbala Basu, (1930) 35 C.W.N. 155 .. 409, 410
Provident Investment Co., Ltd. *v.* The Commissioner of Income-tax, Bombay, (1931) I.L.R. 56 Bom. 92=33 Bom.L.R. 1587=6 I.T.C. 21. 354, 358
Punnayyah *v.* Viranna, (1921) 42 M.L.J. 429=I.L.R. 45 Mad. 425. 118, 227, 228
Puran Chand Nahatta *v.* Monmotho Nath Mukerjee, (1927) 54 M.L.J. 473 =L.R. 55 I.A. 81=I.L.R. 55 Cal. 532 (P.C.) .. 482
Puttanna *alias* Keshava Bhatta *v.* Ramakrishna Sastri, (1906) 17 M.L.J. 374=I.L.R. 30 Mad. 195 .. 48

Q

Queen *v.* Special Commissioner of Income-tax, (1894) 3 T.C. 289 at 290, 291 .. 203
Queen-Empress *v.* Abdullah, (1885) I.L.R. 7 All. 385 (F.B.) .. 603
Queen-Empress *v.* Appavu, (1885) I.L.R. 9 Mad. 141 .. 690
Queen-Empress *v.* Sommanna, (1892) 2 M.L.J. 120=I.L.R. 15 Mad. 221. 180

PAGE.

R

Rachappa Subrao *v.* Shiddappa Venkatrao, (1918) 36 M.L.J. 437=L.R. 46 I.A. 24=I.L.R. 43 Bom. 507 at 518 (P.C.) .. 4
Radharanee *v.* Kshetra Mohan, (1935) 40 C.W.N. 406 .. 91
Raghavalu Chetty *v.* Sabapathy Chetti, (1911) 21 M.L.J. 1013 .. 419
Raghavan Pattar *v.* Arumugam, (1934) 68 M.L.J. 283 .. 165
Raghavendra Rao *v.* Venkataswami Naicken, (1929) 30 L.W. 966 at 971. 552
Raghubar Dyal Sahu *v.* Bhikya Lal Misser, (1885) I.L.R. 12 Cal. 69 .. 227, 228
Raghunandan Prasad Singh *v.* The Commissioner of Income-tax, Bihar and Orissa, (1933) 64 M.L.J. 544=L.R. 60 I.A. 133=I.L.R. 12 Pat. 305=6 I.T.C. 392 at 400 (P.C.) .. 355
Raghunandan Pershad *v.* Moti Ram, (1929) I.L.R. 6 Luck. 497 (F.B.). 247
Raghunath Singh *v.* Hansraj Kunwar, (1934) 67 M.L.J. 813=L.R. 61 I.A. 362=I.L.R. 56 All. 561 (P.C.). 85, 87, 88
Raheem Sahib, *In re,* (1929) 57 M.L.J. 317=I.L.R. 52 Mad. 714 .. 278
Rahimbhoy Habibbhoy *v.* C. A. Turner, (1890) L.R. 18 I.A. 6=I.L.R. 15 Bom. 155 (P.C.). 348, 349, 350
Rai Jatindranath Chaudhuri *v.* Amirta Lal Bagchi, (1900) 5 C.W.N. 20. 69
Raja Ajai Verma *v.* Baldeo Prasad, (1929) I.L.R. 52 All. 536 .. 636
Raja Bhunesh Pratap Narain Singh, *In re,* (1932) 6 I.T.C. 175 .. 321
Rajagopala Chettiar *v.* Hindu Religious Endowments Board, (1933) 40 L.W. 288. 106, 107, 108
Raja of Cochin *v.* Kittunni Nair, (1916) 32 M.L.J. 295=I.L.R. 40 Mad. 603 (F.B.) .. 326
Raja of Deo *v.* Abdullah, (1918) 35 M.L.J. 46=L.R. 45 I.A. 97=I.L.R. 45 Cal. 909 at 918 and 919 (P.C.) .. 35
Rajah of Ramnad *v.* Khamid Rowthen, (1926) 50 M.L.J. 503=L.R. 53 I.A. 74=I.L.R. 49 Mad. 335 at 339 (P.C.) .. 457, 460
Rajah of Ramnad *v.* Sundara Pandiyasami Thevar, (1918) 36 M.L.J. 164 =L.R. 46 I.A. 64=42 Mad. 581 (P.C.) .. 55, 56
Rajanikantha Pal *v.* Jagmohan Pal, (1923) 44 M.L.J. 561=L.R. 50 I.A. 173=I.L.R. 50 Cal. 439 P.C.) .. 365, 714
Raja Shiva Prasad Singh *v.* Secretary of State, (1924) 1 I.T.C. 384 at 388-9 .. 321
Raja Shri Prakash Singh *v.* Allahabad Bank, Ltd., (1928) 56 M.L.J. 233= L.R. 56 I.A. 30=I.L.R. 3 Luck. 684 (P.C.) .. 299
Rajendra Prasad Bose *v.* Gopal Prasad Sen, (1930) 59 M.L.J. 615=L.R. 57 I.A. 296 at 301 (P.C.) .. 481
Raj Gopal Acharjya *v.* Upendra Acharjya Goswami, (1926) I.L.R. 5 Pat. 768 .. 228
Raj Rajeswari Jin *v.* Gati Krishna, (1923) 39 C.L.J. 217 .. 4
Rakkappan *v.* Suppiah, A.I.R. 1930 Mad. 485 .. 164
Ramabhadra Raju Bahadur *v.* Maharajah of Jeypore, (1919) 37 M.L.J. 11 =L.R. 46 I.A. 151=I.L.R. 42 Mad. 813 (P.C.) .. 304, 305
In re, A. S. Ramakrishna Aiyar, (1924) 88 I.C. 91 .. 728, 730
Ramakrishna Chettiar *v.* Viswanatha Chettiar, (1935) 69 M.L.J. 711=I.L.R. 59 Mad. 93 (F.B.) .. 181
Ramakrishna Chetty *v.* Subbaraya Aiyar, (1912) 24 M.L.J. 54=I.L.R. 38 Mad. 101 .. 107
Ramakrishnayya *v.* Seshamma, (1934) 68 M.L.J. 369 .. 740, 741
Ramalinga *v.* Narayana, (1921) 43 M.L.J. 428=L.R. 49 I.A. 168=I.L.R. 45 Mad. 489 (P.C.) .. 97
Ramalingam Chetty *v.* Radhakrishnan Chettiar, (1935) 70 M.L.J. 700 .. 387
Ramalinga Mudali *v.* Ramaswami Aiyar, (1928) 29 L.W. 760 .. 741
Ramalinga Pillai *v.* Sadasiva Pillai, (1864) 9 M.I.A. 506 .. 71
Ramamurthy *v.* Gajapathy Raju, (1932) 64 M.L.J. 361=I.L.R. 56 Mad. 366 .. 39

PAGE.

Raman Nambudri *v.* Achutha Pishurodi, (1904) 35 Mad. 42 .. 86, 88
Rama Rao *v.* The Raja of Pithapur, (1918) 36 M.L.J. 169=I.L.R. 42 Mad. 219 .. 48
Ramaswamy Aiyangar *v.* Govinda Aiyar, (1916) 31 M.L.J. 839 .. 307
Ramaswami Aiyar *v.* Pakkiri Pattar, (1933) 66 M.L.J. 24=38 L.W. 946. 411
Ramaswami Chettiar *v.* Mallappa Reddiar, (1920) 39 M.L.J. 350=I.L.R. 43 Mad. 760 at 778 and 779 (F.B.) .. 135, 136
Ramaswamy Chettiar *v.* Oppilamani Chetty, (1909) 19 M.L.J. 671=I.L.R. 33 Mad. 6 .. 402
Ramaswami Muthirian *v.* Arunachalam Chettiar, (1935) 69 M.L.J. 443 .. 16
Ramaswamy Nadan *v.* Ulaganatha Goundan, (1898) 8 M.L.J. 312=I.L.R. 22 Mad. 49 at 62 and 63 (F.B.) .. 549
Ramasami Naik *v.* Ramasami Chetty, (1907) 17 M.L.J. 201=I.L.R. 30 Mad. 255. 428, 429, 430
Ramasami Pillai *v.* Murugiah Padayachi, (1935) 70 M.L.J. 267=I.L.R. 59 Mad. 268 (F.B.) .. 551
Ramchandra Mantri *v.* Venkatrao, (1882) I.L.R. 6 Bom. 598, 601 .. 370
Ramchandar Upadhya *v.* Mahabir Singh, (1917) 15 A.L.J. 327 .. 257
Ram Charan Ramanuj Das *v.* Gobinda Ramanuj Das, (1928) L.R. 56 I.A. 104 at 110 .. 167
Ram Das Hazra *v.* Secretary of State, (1912) 18 C.W.N. 106 at 110 .. 518
Ramdass Singh *v.* Emperor, (1926) I.L.R. 54 Cal. 152 .. 474
Ram Gopal *v.* Tulshi Ram, (1928) I.L.R. 51 All. 79 (F.B.) .. 677
Ramgopal Ghose *v.* Dhirendra Nath Sen, (1927) I.L.R. 54 Cal. 380 .. 547
Ram Jash *v.* Markande Pathak, A.I.R. 1934 All. 1068 .. 420
Ram Kishore *v.* Jai Narayan, (1921) 42 M.L.J. 80=L.R. 48 I.A. 405=I.L.R. 49 Cal. 120, 131 (P.C.) .. 65
Ram Pershad Chowdry *v.* Jokhoo Roy, (1884) I.L.R. 10 Cal. 1003 .. 48
Ram Pershad *v.* Sheochurn Doss, (1866) 10 M.I.A. 490 at 505 .. 315
Ramraj Singh *v.* Rabi Prasad, (1921) 63 I.C. 140 .. 661
Ram Rup *v.* Sarn Dayal, A.I.R. 1936 Lah. 282 .. 521
Ram Sukh Das *v.* Tota Ram, (1892) I.L.R. 14 All. 339 .. 257, 261
Rangachari *v.* The Secretary of State, (1933) 67 M.L.J. 123=I.L.R. 57 Mad. 857 .. 516
Rangiah *v.* Appaji Rao, (1926) 51 M.L.J. 719=I.L.R. 50 Mad. 300 .. 639
Rani Anand Kunwar *v.* The Court of Wards, (1880) L.R. 8 I.A. 14=I.L.R. 6 Cal. 764 (P.C.) .. 395
Ransom's Case, (1918) 2 K.B. 709 .. 361
Ratna Chetti *v.* Narayanaswami Chettiar, (1914) 26 M.L.J. 616 .. 272
Rathnavelu Mudaliar *v.* Emperor, (1930) M.W.N. (Crl.) 47 .. 76
Ravanappa Reddi, *In re*, (1931) 62 M.L.J. 735=I.L.R. 55 Mad. 343 at 345. 335
Rayalu Aiyar *v.* Vairavan Chettiar, (1936) M.W.N. 866. 282, 284, 285, 286
Regina *v.* Lords Commissioners of the Treasury, (1872) L.R. 7 Q.B. 387. 214
Rengathammal *v.* Venkatachariar, A.I.R. 1930 Mad. 575 .. 229
Rex *v.* Electricity Commissioners, (1924) 1 K.B. 171 .. 445
Rex *v.* London County Council, (1931) 2 K.B. 215 .. 445
Rex *v.* Marsham, (1912) 2 K.B. 362 at 365 .. 338
Rex *v.* Net Bell Liquors, Ltd., (1922) 2 A.C. 128 .. 456
Riddel, *In re*; Earl of Strathmore, *Ex parte* (1888) 20 Q.B.D. 512 .. 348, 349
Robert Fischer *v.* Secretary of State for India in Council, (1898) L.R. 26 I.A. 16=I.L.R. 22 Mad. 270 (P.C.) .. 699
Rodger *v.* The Comptoir D'Escompte de Paris, (1871) L.R. 3 P.C. 465. 23
Rup Chand *v.* Jambu Prasad, (1909) 20 M.L.J. 439=L.R. 37 I.A. 93=I.L.R. 32 All. 247 (P.C.) .. 66
Rungamma *v.* Atchamma, (1846) 4 M.I.A. 1 .. 66

S

Sabapathy Chetty *v.* Ponnuswamy Chetty, (1915) 28 I.C. 365 .. 593

PAGE.

Sachindra Mohun Ghosh *v.* The Commissioner of Income-tax, Bihar and Orissa, (1931) I.L.R. 11 Pat. 47=5 I.T.C. 397 .. 362
Sadasuk Janki Das *v.* Sir Kishan Pershad, (1918) 36 M.L.J. 429=L.R. 46 I.A. 33=I.L.R. 46 Cal. 663 (P.C.). 547, 550, 551, 557; 559
Sadayappa Asari *v.* Raghava Asari, (1919) 27 M.L.T. 325=62 I.C. 220. 593
Saiyed Muzhar Hossein *v.* Mt. Bodha Bibi, (1895) 5 M.L.J. 20=L.R. 22 I.A. 1=I.L.R. 17 All. 112 (P.C.) .. 349, 350
Samaratmal Uttamchand *v.* Govind, (1901) I.L.R. 25 Bom. 696 .. 690
Samuvier *v.* Ramasubba Aiyar, (1931) 60 M.L.J. 527=I.L.R. 55 Mad. 72 .. 177, 678
Sankaralinga Nadar and Brothers *v.* The Commissioner of Income-tax, Madras, (1929) 58 M.L.J. 260=I.L.R. 53 Mad. 420 (F.B.) .. 240
Sankaranarayana Aiyar *v.* Alagiri Aiyar, (1918) 35 M.L.J. 296 .. 639
Sankaranarayana Pillai *v.* Rajamani, (1923) 46 M.L.J. 314=I.L.R. 47 Mad. 462 .. 18
Santu *v.* Abhainandan, A.I.R. 1925 All. 32 .. 387
Sardhari Lal *v.* Ambika Prashad, (1888) L.R. 15 I.A. 123=I.L.R. 15 Cal. 521 at 526 (P.C.) .. 137
Sartaj Kuari *v.* Deoraj Kuari, (1888) L.R. 15 I.A. 51=I.L.R. 10 All. 272 (P.C.) .. 428, 429
Sasiman Chowdhurani *v.* Shib Narayan Chowdhury, (1921) 42 M.L.J. 492=L.R. 49 I.A. 25 at 31=I.L.R. 1 Pat. 305 (P.C.) .. 481
Sassoon & Co. *v.* Ramdutt Ramkissen Dass, (1922) 44 M.L.J. 758=L.R. 49 I.A. 366=I.L.R. 50 Cal. 1 at 9 (P.C.) .. 642
Sathuvayyan *v.* Muthusami, (1888) I.L.R. 12 Mad. 325 .. 229
Satish Chandra Basu *v.* Harendra Kumar Ghose, (1936) 40 C.W.N. 1051 at 1052 .. 482
Satish Chandra Das *v.* Secretary of State for India, (1926) I.L.R. 54 Cal. 44 .. 535
Sat Narain *v.* Rai Bahadur Sri Kishen Das, (1936) 71 M.L.J. 812=L.R. 63 I.A. 384=I.L.R. 17 Lah. 644 (P.C.) .. 251, 283
Sat Prakash *v.* Bahal Rai, (1930) I.L.R. 53 All. 283 (F.B.) .. 412, 414
Satraj Kumari's Case, (1888) L.R. 15 I.A. 51=I.L.R. 10 All. 272 (P.C.). 712
Satyanarayana *v.* Mallayya, (1934) 68 M.L.J. 540=I.L.R. 58 Mad. 735 (F.B.) .. 551, 558
Saudagar Singh *v.* Pardip Narayan Singh, (1917) 34 M.L.J. 67=L.R. 45 I.A. 21=I.L.R. 45 Cal. 510 (P.C.) .. 46
Saxty *v.* Wilkin, (1843) 152 E.R. 954 .. 689
Scammell and Nephew, Ltd. *v.* Hurley, (1929) 1 K.B. 419 .. 584, 587
Second Pithapur Cases, (1918) 35 M.L.J. 392=L.R. 45 I.A. 148=I.L.R. 41 Mad. 778 (P.C.) .. 428, 712
The Secretary of State for India in Council *v.* British India Steam Navigation Co., (1911) 13 C.L.J. 90 at 93, 94 .. 456, 460
Secretary of State for India *v.* D'Attaides, (1934) I.L.R. 12 Rang. 556 .. 521
Secretary of State *v.* Kannepalli Venkataratnammah, (1912) 23 M.L.J. 109. 161
Secretary of State *v.* Shreegobinda Choudhury, (1932) I.L.R. 59 Cal. 1289 at 1299 .. 518
Secretary of State for India in Council *v.* Srinivasachariar, (1920) 40 M.L.J. 262=L.R. 48 I.A. 56=I.L.R. 44 Mad. 421 (P.C.) .. 162, 370
Secretary of State for India *v.* Syed Ahmad Badsha, (1920) 41 M.L.J. 223=I.L.R. 44 Mad. 778 at 801 (F.B.) .. 578
Seetharama Chetty *v.* Seshiah Chetty, (1912) M.W.N. 1011 .. 550
Sellappa Goundan *v.* Masa Naicken, (1923) 45 M.L.J. 675=I.L.R. 47 Mad. 79 at 83 .. 228
Selmes *v.* Judge, (1871) 6 Q.B. 724 .. 584
Sesha Aiyar *v.* Krishna Aiyar, (1935) 70 M.L.J. 36=I.L.R. 59 Mad. 562 (F.B.) .. 231

PAGE.

Seshia Aiyar *v.* Mangal Doss, (1909) 20 M.L.J. 144 .. 421
Seshayya *v.* Sanjivarayudu, (1933) 67 M.L.J. 393. 229, 549, 558
Seshayyangar *v.* Seshayyangar, (1880) I.L.R. 2 Mad. 143 .. 199
Seth Pratap Singh *v.* Keshavlal, (1934) 68 M.L.J. 339=L.R. 62 I.A. 23 =I.L.R. 59 Bom. 180 (P.C.) .. 144
Shama Soondary *v.* Hurro Soondary, (1881) I.L.R. 7 Cal. 348 .. 4
Shankarbhai *v.* Somabhai, (1900) I.L.R. 25 Bom. 417 .. 15
Shanmuganatha Chettiar *v.* Srinivasa Aiyar, (1916) 31 M.L.J. 138=I.L.R. 40 Mad. 727 .. 550
Sheikh Mohammad Yasin *v.* King-Emperor, (1926) I.L.R. 5 Pat. 452 .. 335, 336
Shenton *v.* Smith, (1895) A.C. 229 at 234 .. 521, 535
Sheoparsan Singh *v.* Ramnandan Prasad Singh, (1916) 31 M.L.J. 77=L.R. 43 I.A. 91=I.L.R. 43 Cal. 694 (P.C.) .. 45, 46
Sheo Pershad Singh *v.* Saheb Lal, (1892) I.L.R. 20 Cal. 453 .. 594
Sheo Shankar *v.* Chunni Lal, (1916) I.L.R. 38 All. 669 .. 256, 260
Sheo Shankar Ram *v.* Jaddo Kunwar, (1914) L.R. 41 I.A. 216=I.L.R. 36 All. 383 (P.C.) .. 18
Shiba Prasad Singh *v.* Prayag Kumari Debi, (1932) 63 M.L.J. 196=L.R. 59 I.A. 331=I.L.R. 59 Cal. 1399 (P.C.). 428, 429, 709, 711, 715, 718
Shidlingappa Gurulingappa *v.* Emperor, A.I.R. 1926 Bom. 416 .. 75
Shiva Prasad Singh v. Prayag Kumari Debee, (1933) I.L.R. 61 Cal. 711. 81, 82, 83
Shwe Wa *v.* C. I. Mehta, (1927) I.L.R. 5 Rang. 553 .. 129
Siddalingana Gowd *v.* Bhimana Gowd, (1934) 68 M.L.J. 487 .. 457
Sind Light Railway Co., Ltd. *v.* The Commissioner of Income-tax, Bombay, (1932) 6 I.T.C. 271 .. 623
Singar Kunwar *v.* Basdeo Prasad, (1930) 124 I.C. 717 .. 552
Sir James Laughan, a Lunatic, *In the matter of,* (1847) 2 Ph. 299=41 E.R. 958 .. 293
Sitaram Laxman Rao *v.* Dharmasukhram, (1927) I.L.R. 51 Bom. 971 at 979 (F.B.) .. 482
Sitharama Chetty *v.* Sir S. Subramania Aiyar, (1915) 30 M.L.J. 29=I.L.R. 39 Mad. 700 .. 444
Sivagnana Tevar *v.* Periasami, (1878) L.R. 5 I.A. 61=I.L.R. 1 Mad. 312 (P.C.) .. 430
Sivakami Ammal *v.* Gopalaswamy Odayar, (1924) 48 M.L.J. 390 .. 728, 730
Sivasubramania *v.* Theethiappa, (1923) 45 M.L.J. 166=I.L.R. 47 Mad. 120 .. 638
Slater *v.* Mayor, etc., of Burnley, (1888) 59 L.T. 636 at 639 .. 498
Smith, *In re,* (1923) 45 M.L.J. 731 .. 277
Smith *v.* Shaw, (1829) 10 B. & C. 277=109 E.R. 453 .. 583
Sobhanadri Rao, *In re,* (1932) 63 M.L.J. 759=I.L.R. 56 Mad. 314 .. 741, 742
Somar Singh *v.* Deonandan Prasad Singh, (1927) I.L.R. 6 Pat. 780 .. 408, 410
Somasundaram Chettiar *v.* Commissioner of Income-tax, Madras, (1927) 54 M.L.J. 436=2 I.T.C. 505 .. 354, 358
Sookhmoy Chunder Dass *v.* Srimati Monohurri Dasi, (1885) L.R. 12 I.A. 103 ... 168, 173
Sooratha Singa *v.* Kanaka Singa, (1919) 43 Mad. 867 .. 71
Sparrow, *In re,* (1882) L.R. 20 Ch.D. 320 .. 293
Sreekanta Sundararamiah *v.* Venkatasubbiah, (1924) 46 M.L.J. 380. 404, 405, 406
Sreemati Ayetonnessa Bibi *v.* Amjad Ali, (1928) 48 C.L.J. 184 .. 240
Sree Rajah Bommadevara Venkata Narasimha Naidu *v.* Andavolu Venkataratnam, (1916) 32 M.L.J. 63 .. 238, 239
Sri Emberumanar Jeer Swamigal *v.* The Board of Commissioners for Hindu Religious Endowments, Madras and others, (1936) 71 M.L.J. 588 .. 445
Srimati Mabia Khatun *v.* Sheikh Satkari, (1926) 100 I.C. 264 .. 731
Sri Raghunatha *v.* Sri Brozo Kishoro, (1876) L.R. 3 I.A. 154 at 191 .. 315

PAGE.

Sri Rajah Bommadevara Chayadevamma *v.* Venkataswamy, (1932) 62 M.L.J. 511. 235, 236, 237
Sri Rajah Shiva Prasad Singh *v.* The Crown, (1924) I.L.R. 4 Pat. 73 .. 716
Srishchundra Nandi *v.* Sudhirkrishna Banerjee, (1931) I.L.R. 59 Cal. 216. 448
Subbaraya Mudali *v.* Thangavelu Mudali, (1922) 45 M.L.J. 44 .. 595
K. M. Subbayyar and Sons *v.* P. N. Lakshmana Aiyar and others (S.A. No. 124 of 1930) .. 164
S. P. S. R. Subramania Aiyar *v.* Oomer Cotty Haji, (1933) 38 L.W. 933 .. 412
Subramanya Aiyar *v.* Rathnavelu Chetti, (1917) 33 M.L.J. 224=I.L.R. 41 Mad. 44 (F.B.) .. 32
Subramania Aiyar *v.* Sabapathy Aiyar, (1927) 54 M.L.J. 726=I.L.R. 51 Mad. 361 (F.B.). 245, 247, 251
Subramania Aiyar *v.* Seethai Ammal, (1911) 24 M.L.J. 457=I.L.R. 36 Mad. 135. 455, 457, 458, 459, 463
Subramanian *v.* Ramaswamy, (1932) 62 M.L.J. 562=I.L.R. 55 Mad. 720 (F.B.) .. 298
Subramaniam Chetti *v.* Arunachalam Chetti, (1904) I.L.R. 28 Mad. 1 .. 29
Sukhdeo Dass *v.* Mangal Chand, (1917) 41 I.C. 812 .. 418
Sukdevdoss Ramprasad *v.* Mussamat Choti Bai, (1927) 27 L.W. 145 .. 69
Sumeshar Bind *v.* Baldeo Sahu, (1934) 33 A.L.J. 293 .. 229
Sundaram Aiyar *v.* The Municipal Council of Madura, (1901) 12 M.L.J. 37=I.L.R. 25 Mad. 635 at 650 and 651 .. 598
Sundaramma *v.* Abdul Khadar, (1932) 64 M.L.J. 664=I.L.R. 56 Mad. 490 (503) (F.B.) .. 672
Supputhayammal, *In re,* (1932) 62 M.L.J. 624=I.L.R. 55 Mad. 664 .. 350
Surayya *v.* Annapurnamma, (1919) I.L.R. 42 Mad. 699 .. 45
Surayya *v.* Subbamma, (1919) 37 M.L.J. 405=I.L.R. 43 Mad. 4 .. 48
Surjiram Marwari *v.* Barhamdeo Prasad, (1905) 2 C.L.J. 288 at 300 .. 307
Suryanarayana *v.* Ramachendrudu, A.I.R. 1932 Mad. 716 .. 406
Suryanarayana *v.* Ramadoss, (1917) 34 M.L.J. 87=I.L.R. 41 Mad. 604 .. 9
Suryanarayana *v.* Viswanadhan, (1936) 71 M.L.J. 518 .. 247
Sutton, *In re,* (1885) 28 Ch.D. 464 .. 168
Swabey *v.* Port Darwin Gold Mining Company, (1889) 1 Megone 385 .. 513
Syed Pitchai Rowther *v.* Devaji Rao, (1936) 71 M.L.J. 611 .. 199

T

Tarini Charan Battacharya *v.* Kedar Nath Haldar, (1928) I.L.R. 56 Cal. 723 (F.B.) .. 235, 240
Tata Iron and Steel Co., Ltd. *v.* Chief Revenue Authority of Bombay, (1923) 45 M.L.J. 295=L.R. 50 I.A. 212=I.L.R. 47 Bom. 724 at 733 (P.C.). 214, 348
Tayammal *v.* Seshachala Naicker, (1865) 10 M.I.A. 429 at 433 .. 72
Tekana Kavandan *v.* Alagiri Kavandan, (1914) 25 I.C. 506 .. 4
Thakur Barmha *v.* Jiban Ram Marwari, (1913) 26 M.L.J. 89=L.R. 41 I.A. 38=I.L.R. 41 Cal. 590 (P.C.) .. 258
Thankammal *v.* Kunhamma, (1913) 37 M.L.J. 369 .. 550, 558
Theobald *v.* Crichmore, (1818) 1 B. & Ald. 227=106 E.R. 83 .. 582
Thirumalaisami Naidu *v.* Subramanian Chettiar, (1916) 40 Mad. 1009 .. 107
Thirumalamuthu Adaviar *v.* Subramania Adaviar, (1937) 1 M.L.J. 243 .. 250, 251
Thimma Reddi *v.* Subba Reddiar, (1918) 49 I.C. 141 .. 299
Tirath Ram *v.* Mst. Kahan Devi, (1920) I.L.R. 1 Lah. 588 .. 65
Tuljaram Row *v.* Alagappa Chettiar, (1910) 21 M.L.J. 1=I.L.R. 35 Mad. 1 (F.B.) .. 347

U

Ulagalum Perumal Sethurayar *v.* Subbulakshmi Nachiar, (1935) 71 M.L.J. 1. 687
Ulaganatha *v.* Alagappa, A.I.R. 1929 Mad. 903 .. 302

PAGE.

Unnamalai Ammal *v.* Abboy Chetty, (1925) 50 M.L.J. 172 .. 18
U Tha Lu *v.* Devanarain, A.I.R. 1934 Rang. 206 .. 578

V

Vaidyanatha Aiyar *v.* Swaminatha Aiyar, (1924) 47 M.L.J. 361=L.R. 51 I.A. 282=I.L.R. 47 Mad. 884 (P.C.) .. 476
Vaithinatha Aiyar *v.* Thyagaraja Aiyar, (1919) 41 M.L.J. 20 .. 476
Vaji Singji *v.* Secretary of State, (1924) 47 M.L.J. 574=L.R. 51 I.A. 357 at 360, 361, 367=I.L.R. 48 Bom. 613 (P.C.) .. 370
Valia Muhammad *v.* Savakkutti Koyi, (1933) 66 M.L.J. 355 .. 569
Vancheswara *v.* Narayana, A.I.R. 1933 Mad. 251 .. 164
Varada Pillai *v.* Jeevarathnammal, (1919) 38 M.L.J. 313=L.R. 46 I.A. 285=I.L.R. 43 Mad. 244 (P.C.) .. 688
Vedapuratti *v.* Vallabha Valiya Raja, (1902) 12 M.L.J. 128=I.L.R. 25 Mad. 300 (F.B.). 84, 85, 86, 87
Vedathanni *v.* Commissioner of Income-tax, (1932) 63 M.L.J. 542=I.L.R. 56 Mad. 1 (F.B.). 313, 314, 321
Verammal *v.* Kamu Ammal, (1915) 2 L.W. 850 .. 49
Veeranna *v.* Sayamma, (1928) 56 M.L.J. 401=I.L.R. 52 Mad. 398 .. 20, 70
Veerappa Chettiar *v.* Annamalai Chettiar, (1934) 68 M.L.J. 157 .. 246, 248
Veerappa Chettiar *v.* Ramaswamy Aiyar, (1903) I.L.R. 27 Mad. 106 .. 229
Verappudayan *v.* Muthukaruppa Thevan, (1913) 24 M.L.J. 534 .. 86
Velayuthan *v.* Lakshmana, (1885) I.L.R. 8 Mad. 506 .. 644
Velayuda Reddi *v.* Narasimha Reddi, (1916) 32 M.L.J. 263 .. 404
Vellayappa Chetti *v.* Subramanian Chettiar, (1926) 51 M.L.J. 880=I.L.R. 50 Mad. 482. 234, 235, 236, 237, 241
Vema Rangiah Chetty *v.* Vajravelu Mudaliar, (1917) 33 M.L.J. 618=I.L.R. 41 Mad. 370 .. 81
Venkatachariar *v.* Rangaswami Aiyar, (1918) 36 M.L.J. 532 .. 690
Venkatacharyulu *v.* Rangacharyulu, (1890) 1 M.L.J. 85=I.L.R. 14 Mad. 316 .. 197
Venkata Chetti *v.* Aiyanna Goundan, (1916) 31 M.L.J. 712=I.L.R. 40 Mad. 561 (F.B.) .. 693
Venkata Hanumantha Rao *v.* Gangayya, (1928) 55 M.L.J. 168=I.L.R. 51 Mad. 594 .. 638
Venkatakrishnayya *v.* Byragi, (1925) 50 M.L.J. 353 .. 233
Venkatalal *v.* Kosaladasa Bavaji, (1930) 61 M.L.J. 39 .. 741
Venkatalingama Nayanim Bahadur *v.* Arunachallam Chettiar, (1924) 19 L.W. 132 .. 424
Venkataramanayya Pantulu *v.* Venkataramana Doss Pantulu, (1905) 16 M.L.J. 69=I.L.R. 29 Mad. 200 (F.B.) .. 283
Venkata Rao *v.* Secretary of State, (1937) 1 M.L.J. 529=L.R. 64 I.A. 55. 527
Venkataratnam *v.* Subba Rao, (1926) 51 M.L.J. 410=I.L.R. 49 Mad. 738. 177
Venkata Reddi *v.* T. V. Dorasami Pillai, (1932) 63 M.L.J. 722=I.L.R. 56 Mad. 339 .. 257, 260
Venkatasubba Rao *v.* Narayana Rao, (1921) 15 L.W. 450 .. 660, 661
Venkateswara Ethiappa Naicker *v.* Alagoo Mootoo Servagaran, (1861) 8 M.I.A. 327 at 330, 331 .. 698
Venkatarangayya Appa Row *v.* Murala Sriramulu, (1912) 17 I.C. 593 .. 457
Venkatarayadu *v.* The Maharajah of Pithapuram, (1927) 54 M.L.J. 138=I.L.R. 51 Mad. 774 .. 405, 406
Venkayya *v.* Raghavayya, (1935) 68 M.L.J. 590 .. 137
Venugopala Rao *v.* Venkatarayudu, (1911) 10 M.L.T. 450 .. 89
Venugopal Naidu *v.* Ramanadhan Chetty, (1912) 23 M.L.J. 61=I.L.R. 37 Mad. 458 .. 232, 233
Vijaya Ramayya *v.* Venkatasubba Rao, (1915) 30 M.L.J. 465=I.L.R. 39 Mad. 853 .. 387

PAGE.

Vijayasinghji v. Shivasangji, (1935) I.L.R. 59 Bom. 360 (P.C.) .. 69, 70
Viraragavamma v. Samudrala, (1885) I.L.R. 8 Mad. 208 .. 229
Viswanatha Mudali v. Doraiswami Mudali, (1925) 49 M.L.J. 684=I.L.R. 48 Mad. 944 .. 392, 393
Vizianagaram Maharajah v. Sitaramaraju, (1895) I.L.R. 19 Mad. 100 .. 698
Vizianagaram Maharajah v. Suryanarayana, (1886) L.R. 13 I.A. 32=I.L.R. 9 Mad. 307 (P.C.) .. 698
Vythilinga Pandarasannadhi v. The Board of Control, Sri Thiagarajaswami Devasthanam, Tiruvarur, (1931) 61 M.L.J. 904 .. 608

W

Ward v. Lloyd, (1844) 7 Scott's N.R. 499 at 506 .. 417
Westheard v. Sprosen, (1861) 6 H. & N. 728=158 E.R. 301 .. 54

Y

Yellappa Ramappa Naik v. Tippanna, (1928) 56 M.L.J. 287=L.R. 56 I.A. 13=I.L.R. 53 Bom. 213 (P.C.) .. 552
Young v. Adams, (1898) A.C. 469 .. 518
Young v. Waller, (1898) A.C. 661 at 664 .. 518

Z

Zamindar of Polavaram v. Maharajah of Pithapuram, (1930) 60 M.L.J. 56 =I.L.R. 54 Mad. 163. 690, 695, 696, 699, 700

Mode of Citation: (1937) 1 M.L J.

THE

Madras Law Journal Reports.

1937] JANUARY [I

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR. M. VENKATASUBBA RAO, *Kt., Officiating Chief Justice,* MR. JUSTICE CORNISH AND MR. JUSTICE VENKATARAMANA RAO.

Madana Mohana Naiko .. *Appellant* (Plaintiff)*

v.

Krupasindhu Naiko (dead) and others ... *Respondents (Defendants and 1st defendant's Legal Representatives).*

F.B.

Madana Mohana Naiko *v.* Krupa-sindhu Naiko.

Court-Fees Act (VII of 1870), S. 12 (2)—Scope—Deficiency in court-fee —Erroneous decision regarding category of suit—Appeal to High Court— Power of Court to collect deficient court-fee—Civil Procedure Code (V of 1908), Ss, 2, 96 and O. 7. r. 11.

The Appellate Court has power under S. 12 (2) of the Court-Fees Act to require a party to make good the deficiency in the Court-fee payable by him in the lower Court in cases in which the lower Court has expressly or impliedly decided the question of the category in which the suit ought to be placed for purposes of Court-fee but which decision is in the opinion of the Appellate Court erroneous.

Scope of S. 12 of the Court-Fees Act discussed with reference to Ss. 2, 96 and O. 7, r. 11, Civil Procedure Code, 1908.

Appeal against the decree of the Court of the Subordinate Judge of Berhampore in O. S. No. 35 of 1927.

The appeal first came up before Cornish and Varadachariar, JJ., who made the following Order of Reference to a Full Bench:—

Varadachariar J.—In this case, a question as to the scope of cl. (2) of S. 12 of the Court-Fees Act has been raised, under the

* Appeal No. 432 of 1929. 7th October, 1936.

F.B.

Madana Mohana Naiko v. Krupasindhu Naiko.

following circumstances. The plaintiff who sued for partition valued the suit for purposes of jurisdiction at Rs. 6,000, but he paid a court-fee of Rs. 100 only under Art. 17-B of the Court-Fees Act. An issue (No. 10) was raised as to whether the court-fee paid was correct; the lower Court, without any discussion, held it was correct.

As the suit was decided against the plaintiff, he filed an appeal here, valuing the appeal at Rs. 6,000 but again paid a court-fee of Rs. 100 only. When the matter came before us, we held that court-fee should be paid on an *ad valorem* basis, under S. 7 (*iv*) (*b*) of the Court-Fees Act and the appellant has accordingly paid in the amount required to make up the fee payable on the valuation of Rs. 6,000. With reference to the additional fee payable on the same basis in the Lower Court Mr. Jagannadha Doss has contended that the case does not fall under cl. (2) of the S. 12 of the Court-Fees Act and the plaintiff cannot now be called upon to pay the additional fee.

The argument was based on certain decisions of this Court and of the other High Courts, relating to the provision as to finality in the concluding part of the first clause of S. 12. As the question raised is one of some general importance we gave notice to the Government Pleader and have had the benefit of an argument on behalf of the Government. Though we do not feel much doubt as to the true construction of cl. (2), we have preferred to refer the matter to a Full Bench, because our view may seem to restrict or qualify the language employed in the judgment of the Full Bench in *Lakshmi Amma* v. *Janamajayan Nambiar*[1].

Beginning with *Annamalai Chetti* v. *Lieut. Col. J. G. Cloete*[2] this Court has consistently held that the concluding words of cl. (1) of S. 12 do not preclude an appeal by a *party* when the question raised relates not to 'valuation' in the narrow sense of *amount* but to the 'category' in which a suit is to be placed for the purpose of determining the court-fee. The view taken in *Annamalai Chetti* v. *Lieut.-Col. J. G. Cloete*[2] was affirmed by a Full Bench in *Lakshmi Amma* v. *Janamajayan Nambiar*[1]. Mr. Jagannada Doss argues that the expression "the said question" in cl. (2) of S. 12 must be interpreted in the light of these decisions that an appellate Court can act under this clause only when there has been an error in the lower Court's determination of the *amount* at which the subject-matter of the suit should be valued and that where, as in the present case, the lower Court has erred in determining the 'category' in which a suit is to be placed, the appellate Court cannot invoke this clause and require the party to

1. (1894) 4 M.L.J. 183 (F.B.). 2. (1881) I.L.R. 4 Mad. 204.

pay the additional fee required to make up the proper fee payable on the plaint in the lower Court. We are not prepared to accept this contention.

The decisions above referred to do not proceed on the footing that the word 'valuation' will not comprise the question of *category* as well as the question of *amount*. Indeed, under the opening words of cl. (1), it is the duty of the Court to decide both classes of questions; the question of category will fall to be decided on the construction of the plaint and the question of amount may have to be determined after an investigation under Ss. 9 and 10 of the Act. But in pursuance of the principle that court-fee is primarily a question of revenue and not a matter in dispute between the parties, the legislature thought it right to exclude a right of appeal in such matters and hence provided that the decision of a Court under cl. (1) of S. 12 "shall be final as between the parties". Difficulties arose in reconciling this provision with the provision in the Civil Procedure Code giving a right of appeal against an order rejecting a plaint for non-payment of the proper court-fee. The High Courts have sought to reconcile the two provisions by holding that the finality enacted by S. 12, cl. (1) of the Court-Fees Act must, in view of the right of appeal given in the Code, be restricted to cases where the decision of the lower Court relates to the question of amount and not to the question of category. It is unnecessary for us to say anything as to the correctness or otherwise of this line of reasoning. But we think that the language employed in the decisions dealing with this question must be understood with reference to the question then under consideration and not extended to cover the interpretation of cl. (2) of S. 12 which has been enacted with a wholly different purpose in view, namely, the protection of the interests of the revenue.

Even as a matter of construction, it seems to us that the expression 'said question' in cl. (2) refers back to the expression 'every question' in the opening part of the first clause and if the opening words of the cl. (1) will comprise both sets of questions, namely, amount as well as categroy, we see no reason why the same scope should not be given to cl. (2) as well. The last few words of cl. (1) are really paranthetical and there is no reason why cl. (2) should be read as a proviso to the main provision in cl. (1). It is true that a fiscal enactment should be interpreted according to the natural meaning of the words employed but there is no more justification for restricting their natural meaning than for widening it. If by reason of the collocation of the provisions there is any room for ambiguity, it seems to us legitimate to have due regard to the fact that the purpose of cl. (2) is to protect the interests of the revenue.

F.B.

Madana Mohana Naiko v. Krupasindhu Naiko.

In *Shama Soondary* v. *Hurro Soondary*[1] and in *Lakshmi Ammal, In re*[2] the power of the Appellate Court to take action under S. 12, cl. (2) in circumstances like those of the present case was recognised, but the question was not raised or considered in its present form. The observations of the Privy Council in *Rachappa Subrao* v. *Shidappa Venkatrao*[3] and the decision of this Court in *Tekana Kavandan* v. *Alagiri Kavandan*[4] no doubt affirm the differentiation between the interests of the revenue and the rights of the parties, but they do not throw much light on the present aspect of the question, nor are the decisions in *Raj Rajeswari Jiu* v. *Gati Krishna*[5] and *Baij Nath* v. *Dhani Ram*[6] of much help in this connection.

We may add that it has been contended on behalf of the Government that even if cl. (2) of S. 12 should be construed in the manner suggested on behalf of the appellant, the appellate Court may insist on the payment of the deficient fee even in respect of the Lower Court, either under S. 28 of the Court-Fees Act or in the exercise of inherent power. We are not much impressed with this argument but as we are referring the question to a Full Bench, we have thought it right to refer to the argument. We refer the following question for the opinion of a Full Bench.

> "Has an appellate Court power to require a party to make good the deficiency in the court-fee payable by him in the lower Court in cases in which the lower Court has expressly or impliedly decided the question of the category in which the suit ought to be placed for purposes of court-fee but such decision is in the opinion of the appellate Court erroneous."

On this reference the appeal came on for hearing before a Full Bench as constituted above.

S. A. Seshadri Aiyangar for *B. Jagannadha Das* for Appellant.

K. S. Champakesa Aiyangar for the Government Pleader. (*K. S. Krishnaswami Aiyangar*) on behalf of the Government.

The Opinion of the Court was delivered by

Venkatasubba Rao, Offg. C.J.

The Officiating Chief Justice.—The question of law referred to the Full Bench for determination is interesting and not covered by authority. When the appeal came to be heard by the referring Judges, it was found that the court-fee paid on the memorandum of appeal was deficient and an order was

---

1. (1881) I.L.R. 7 Cal. 348.
2. (1925) 49 M.L.J. 608.
3. (1918) 36 M.L.J. 437: L.R. 46 I.A. 24: I.L.R. 43 Bom. 507 at 518 (P.C.).
4. (1914) 25 I.C. 506.
5. (1923) 39 C.L.J. 217.
6. (1929) I.L.R. 51 All. 886.

F.B.

Madana Mohana Naiko v. Krupasindhu Naiko.

Venkatasubba Rao, Offg. C.J.

thereupon made directing that the proper amount should be paid. So far the case presented no difficulty, but the question arose whether the learned Judges could require the appellant to pay the proper court-fee in the Court of First Instance. The doubt that has arisen, which has led to this reference, may be expressed as follows. S. 12 of the Court-Fees Act runs thus:—

"(*i*) Every question relating to valuation for the purpose of determining the amount of any fee chargeable under this chapter on a plaint or memorandum of appeal shall be decided by the Court in which such plaint or memorandum, as the case may be, is filed, and such decision shall be final as between the parties to the suit.

(*ii*) But whenever any such suit comes before a Court of Appeal, reference or revision, if such Court considers that the said question has been wrongly decided to the detriment of the revenue, it shall require the party by whom such fee has been paid to pay so much additional fee as would have been payable had the question been rightly decided, and the provisions of S. 10, paragraph 11, shall apply."

It seems to have been argued, that in what is termed 'valuation' two different things are involved, first, the fundamental question of category and secondly, the question of appraisement, and, that it has been held in numerous decisions that the finality contemplated in the first sub-section, attaches to a decision relating to appraisement as distinguished from category. The next step in the argument seems to be, that the words "the said question" in the second part must receive the same interpretation as the expression "every question relating to valuation" in the first part and if that be so, when the decision relates to category, it does not attract the operation of the second part and the appellate Court cannot therefore make an order directing the deficiency to be made good. This contention appears to us to involve a fallacy. The words "every question" are of a comprehensive nature and there seems to be no reason why they should be construed in the restrictive sense suggested; indeed, some at any rate of the decided cases show that the view that a decision relating to category is not final, is not based upon any such limited construction. True, that in *Annamalai Chetti* v. *Lieut.-Col. J. G. Cloete*[1], the learned Judges place upon the words the narrow meaning. They observe:

"In our judgment the terms of the 12th section ought not to receive a larger interpretation than they fairly admit of. They do not declare the decision of the Court in which the plaint or appeal is filed final on all ques-

1. (1881) I.L.R. 4 Mad. 204.

F.B.

Madana Mohana Naiko v. Krupasindhu Naiko.

Venkatasubba Rao. Offg. C.J.

tions which may arise respecting the court-fee but on every question relating to *valuation* for the purpose of determining the amount of the court-fee."

It is difficult to see, as observed in *Muhammad Sadik* v. *Muhammad Jan*[1], how a Court could determine the amount without deciding the question as to the relief sought that is the category to which a particular suit belongs) and how yet the relief sought is to be deemed as not comprised in the question relating to the valuation (at p. 93). On the other hand, in a later case on the point, namely, *Lakshmi Amma* v. *Janamajayan Nambiar*[2], the learned Judges proceeded upon the footing that the word 'valuation' comprises both the factors that is the category as well as the computation of value. Having said so, they felt constrained to hold in view of certain provisions of the Civil Procedure Code, that the question of valuation should be viewed in two aspects for the purpose of deciding when a decision as to valuation is final and when appealable. They ultimately decided that when the mistake made by the Judge relates to the category, an appeal lies and not when it relates to the computation. Whether the 1877 Code, which was then under consideration, warrants this conclusion, is a matter open to doubt, but it is not at present within our province to express any final opinion on that point. The difficulty felt seems to have been, as to how to reconcile the provisions of the Code relating to appealability with S. 12 of the Court-Fees Act. Now let us examine the provisions of the present Civil Procedure Code. O. 7, r. 11 shows that the question of the deficient court-fee can be viewed not only in two (as assumed in *Lakshmi Amma* v. *Janamajayan Nambiar*[2])., but in three aspects. Cl. (*b*) refers to the case where the relief claimed is under-valued. This comprises both the category and the computation. Under cl. (*c*) the mistake relates neither to category nor to appraisement; the valuation in both these aspects having been properly made, the plaint is nevertheless written upon an insufficiently stamped paper. R. 11 provides that the plaint shall be rejected when the plaintiff being required to make good the deficiency fails to do so. The rejection of a plaint under S. 2 amounts to a decree and is appealable under S. 96. Were the matter *res integra*, it does not seem to us impossible to reconcile these provisions with S. 12 of the Court-Fees Act, giving full effect to both the statutes. The present trend of decisions seems to be that where

1. (1888) I.L.R. 11 All. 91 (F.B.). 2. (1894) 4 M.L.J. 183 (F.B.).

F.B.

Madana Mohana Naiko v. Krupa-sindhu Naiko.

Venkata-subba, Rao, Offg. C.J.

plaint is rejected under clause (*b*) of O. 7, r. 11, the order rejecting the plaint is not appealable when the order is based on a question of valuation pure and simple; but if the order involves a decision of the category to which a suit belongs, the order is appealable. As we have said, this view is the result of the endeavour to reconcile the Code with the Court-Fees Act, but is it really necessary to take such a view? One might suggest that if the decision under S. 12 of the Court-Fees Act leads to a rejection of the plaint under the Code, then such a rejection, amounting as it does to a decree, ought in all cases to be appealable; but where the decision does not lead to rejection of the plaint, there is no reason why finality should not in every case attach to that decision. In this way, as we have observed, both the statutes can be reconciled. To explain what we mean, let us take this example. Supposing the Court decides that the proper court-fee has been paid, that decision should be final as between the parties and it should not be open to the defendant to question it. Again, let us suppose that the Court decides that the court-fee paid is deficient and requires the plaintiff to make good the deficiency and he complies with that order; here no question of the rejection of plaint can arise and the decision as between the parties ought to be final. As we have said, however, this is not a matter which directly arises under the present reference, but the discussion is relevant in this way. It shows that the view taken in the numerous cases as to appealability does not necessarily rest upon the restrictive construction suggested of the opening words of S. 12. We have already referred in this connection to *Lakshmi Amma* v. *Janamajayan Nambiar*[1]. The only ground urged therefore disappearing, we can see no ground which would justify us in giving to the words "the said question" in the second part the limited meaning contended for. Though the question has been pointedly raised here for the first time, we may observe that our attention has been drawn to numerous cases where it was assumed, without discussion, that the High Court acting under S. 12 (*ii*) has power to require the plaintiff to bring the additional fee payable in the lower Court even where its decision was as to category as distinguished from computation.

Our answer to the question is therefore in the affirmative.

Reference answered in the affirmative.

B. V. V.

---

1. (1894) 4 M.L.J. 183 (F.B.).

[FULL BENCH]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—JUSTICE SIR M. VENKATASUBBA RAO, MR. JUSTICE VARADACHARIAR AND MR. JUSTICE HORWILL.

P. Sivasuryanarayana Chetty *alias* Alleyya, minor by next friend Seshamma .. *Appellant** (*Plaintiff*)

v.

P. Audinarayana Chetti and another .. *Respondents* (*Defendants*).

F.B.

Sivasurya narayana Chetti *v.* Audi- narayana Chetti.

Hindu Law—Adoption—Widow's husband's brother giving consent—Allegations of fraud and corruption with regard to motive for consent found wanting—Adoption valid—Revocation after consent once given by sapinda—*Not valid.*

When a sapinda upon a dispassionate consideration of the question once gives his consent for the adoption of a boy, he cannot arbitrarily or capriciously withdraw it.

Śuryanarayana v. *Ramadoss*, (1917) 34 M.L.J. 87: I.L.R. 41 Mad. 604, Seshagiri Aiyar, J's views approved.

It is contrary to the spirit of Hindu Law, which treats a sapinda's consent as amounting to an expression of his opinion that the adoption conduces to the spiritual benefit of the deceased person, to say that the discretion in the exercise of which a sapinda gives his consent necessarily carries with it a power to revoke.

Appeal against the decree of the Court of the City Civil Judge, Madras, in O. S. No. 52 of 1933.

T. M. Krishnaswamy Aiyar instructed by *Short Bewes & Co*, for Appellant.

V. Radhakrishnayya, Y. Venkatasubramanian and *Kasturi Seshagiri Rao* for Respondents.

The Judgment of the Court was delivered by

Venkata-subba Rao, J.

Venkatasubba Rao, J.—This appeal was directed to be posted before a Bench of three Judges, as it was thought it would become necessary to examine conflicting decisions on the points raised.

The facts have been fully and lucidly set out by Mr. Ramappa in his judgment and we shall therefore refer only to such of them as have an immediate bearing on the questions at issue. There were three brothers Audinarayana, Venkatasubbayya and Subbaroya. Venkatasubbayya died in 1926 and his minor son is the plaintiff. The second defendant is the widow of Subbaroya, who died in 1931. Audinarayana, the surviving brother is the first defendant. The plaintiff alleged in his plaint that on the strength of the first defendant's consent, which he attacked as being fraudulent and corrupt, the second defen-

* C. C. C. Appeal No. 11 of 1934. 20th October, 1936.

dant proposed to take in adoption, a boy by name Radhakrishna, her brother's son, and the suit was brought for a declaration that the consent was invalid and for an injunction restraining the widow from making the intended adoption.

We must at the outset state that in the lower Court it was objected on behalf of the defence, that a suit such as the present, asking for a declaration of the sort claimed, is not legally maintainable. The objection was expressly abandoned before us and therefore we have not had to consider the question whether the present suit does lie or not. We refer to this, in order to guard against our decision being understood as involving any pronouncement on that point.

Now to return to the facts, the first defendant's consent was given by a deed dated 26th January, 1933, which was registered. The suit was filed on the following day, that is, the 27th January and on the 24th July, when the action was pending, the first defendant sent a notice to the widow revoking his consent.

Two questions have been raised: first, whether the first defendant's consent was given with a fraudulent or corrupt motive and was therefore not sufficient to validate the adoption and secondly, whether the subsequent revocation was proper and valid.

[After dealing with the evidence on the question whether the sapinda's consent was influenced by fraudulent or corrupt motives and finding them not existing His Lordship proceeded.]

Then we pass on to the question whether a sapinda's consent is revocable and if so, whether the revocation here is valid. As the lower Court points out, the first defendant in revoking his consent acted arbitrarily. As already mentioned, he gave his consent on the 26th January, 1933; in his written statement, filed on the 23rd March, there is a re-affirmation by him of his previous consent, which he wishes should remain in force. But within a few months, he changed his mind and purported to cancel it, but had the honesty to admit in the witness-box that his revocation was due to "family misunderstandings", though he would add that he would prefer a Bokkali boy. On this evidence the learned Judge's conclusion that the revocation was arbitrary, is perfectly justified. As Seshagiri Aiyar, J., points out in *Suryanarayana* v. *Ramadoss*[1]

1. (1917) 34 M.L.J. 87: I.L.R. 41 Mad. 604.

F.B.

Siva-suryanarayana Chetti v. Audi-narayana Chetti.

Venkatasubba Rao, J.

the assent of a sapinda is presumptive evidence of the *bona fides* to the widow's act. That being of the essence of the doctrine of consent, it is impossible to uphold the contention that a sapinda may at his pleasure withdraw his consent. It has been faintly argued that the discretion in the exercise of which a sapinda gives his consent, necessarily carries with it a power to revoke it. This is contrary to the spirit of the Hindu Law, which treats a sapinda's consent as amounting to an expression of his opinion that the adoption conduces to the spiritual benefit of the deceased person. We without hesitation concur in the view of Seshagiri Aiyar, J., when a sapinda upon a dispassionate consideration of the question once gives his consent, he cannot arbitrarily or capriciously withdraw it. Whether he can do so for justifiable reasons, is a matter we need not go into, for, in the present case, there is not a shadow of justification for suggesting that such reasons exist.

Some analogy was suggested between a husband's authority and a *sapinda's* consent, but it is hardly necessary to remark that in this respect they are entirely dissimilar. That a husband can revoke his authority, can admit of no doubt, although the statement by Sircar that he may revoke it "at any time *before adoption*" is somewhat misleading, as any adoption by the widow must necessarily be only after the husband's death and at that time no question of revocation by him can possibly arise. (Sircar's Hindu Law of Adoption, 2nd Edn., p. 237).

In the result, the appeal is dismissed with costs of the second respondent.

K. C. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Ordinary Original Civil Jurisdiction.]

PRESENT:—MR. JUSTICE GENTLE.

In the matter of Universal Mutual Aid and Poor Houses Association. Ltd.. Madras.

In the matter of The Universal Mutual Aid and Poor Houses Association, Ltd., Madras.

A. D. Thoppa Naidu and others .. *Petitioners**

C. V. Nagaraja Sastri (Managing Official Liquidator herein) .. *Applicant.*

L. M. Gesan (a claimant herein) .. *Respondent.*

Company—Memorandum of Association—Among objects mentioned that 30 per cent. of the subscription to go to specified charity—Whether in the

* O. P. No. 111 of 1931. Appl. No. 1212 of 1936. 23rd October, 1936.

In the matter of Universal Mutual Aid and Poor Houses Association, Ltd., Madras.

absence of a definite amount as subject-matter of the trust being mentioned, requisites of valid trust existing—Terms of donation certificate issued creating trust.

A company (in liquidation) issued to subscribers donation certificates which were accepted by the subscribers upon the condition endorsed thereon and in the recital. In the memorandum of association of the company among its primary objects was a clause to allocate 30 per cent. at least of the monies coming to them from certificate-holders towards specified charities. Whenever any person desired to become a certificate-holder he did so only upon the terms of the certificate and upon the terms of the memorandum of association, of which he would have constructive notice, and he would know that of the monies that he transmitted to the company, 30 per cent. was to be allocated to the charity and the company on the other hand in accepting them accepted those contributions upon the basis that 30 per cent. was to be so allocated. On the question turning upon whether a certain amount in suspense account should be so marked with the trust created by the terms above mentioned and allocated by the official liquidator,

Held, that all the three requisites laid down for a valid trust mentioned in *Knight* v. *Knight*, (1840) 3 Beav. 148 at 172: 49 E.R. 58, namely, that (1) the words must be such that on the whole they ought to be construed as imperative; (2) the subject-matter of the trust must be certain; (3) the objects or persons intended to be benefited must be certain, were fulfilled here.

When a certificate holder sent to the company monies, which were transmitted periodically, he was clearly communicating the object which was to be fulfilled in regard to the 30 per cent. and having, by accepting the certificate, undertaken the obligations contained in the certificate, he did all that he had to, as visualised in *Milroy* v. *Lord*, (1862) 7 L.T.Rep. 178 at 181 and a trust was there and then created and the company from that time held the monies as trustees for carrying out the object of the trust.

Hence the official liquidator was entitled to allocate the monies in the suspense account towards the trust and charity, mentioned in the donation certificate issued by the company before it went into liquidation.

In the matter of The Indian Companies Act (VII of 1913) and *In the matter of* The Universal Mutual Aid and Poor Houses Association Limited, Madras (in Liquidation).

K. P. Sarvothama Rao and *V. Bhavani Sankar* for Applicant.

C. V. Nagaraja Sastri the Managing Official Liquidator in person.

V. Sivaprasad and *T. Krishnamachari* for Respondents.

The Court delivered the following

JUDGMENT.—This is an application by the Managing Official Liquidator in the matter of the Universal Mutual Aid and Poor Houses Association, Limited (in Liquidation) for directions regarding a sum which, I am informed, amounts to Rs. 2,335-2-10 which is part of monies in a suspense account, and the application arises under these circumstances. The company in liquidation issued to subscribers donation

In the matter of Universal Mutual Aid and Poor Houses Association, Ltd., Madras,

certificates which were accepted by the subscribers upon the condition endorsed thereon and in the recital, the certificate-holder expressed himself as desirous of doing charity. In the memorandum of association of the company amongst its primary objects was to allocate 30 per cent. at least of the monies coming to them from the certificate-holders towards specified charities; in regard to the remaining 70 per cent. of the monies subscribed, that part was to form a fund from which benefits might from time to time be available to certificate-holders and in respect of which there is no necessity now for me to discuss. The Company has received altogether a sum of approximately Rs. 10,000 and instead of allocating 30 per cent. to charity and 70 per cent. to the other objects I have indicated, the whole was placed in what was called a suspense account and the monies paid were entered in a suspense ledger. Whenever any person desired to become a certificate-holder, he did so only upon the terms of the certificate and upon the terms of the memorandum of association, of which he would have constructive notice, and he would know that of the monies that he transmitted to the company 30 per cent. was to be allocated to charity and the company on the other hand in accepting contributions from certificate-holders accepted those contributions upon the basis that 30 per cent. was so to be allocated. From this it is to my mind clear that when a certificate-holder transmitted monies to the company, in regard to 30 per cent. of the amount so paid a trust was created and the monies were accepted by the company upon trust. It is in regard to such 30 per cent. that the sum I have already mentioned, Rs.2,335-2-10, is found in the accounts of the company and the official liquidator requires directions.

It is contended that no trust was created and that the individual certificate-holder intended to create no trust unless and until he himself had derived benefit from the company. I am unable to accept that contention. I have been referred to the case of *Knight* v. *Knight*[1] and to Lord Longdale's remarks at page 172 by which he lays down that to create a valid trust there are three requisites: (1) the words must be such that on the whole they ought to be construed as imperative; (2) the subject-matter of the trust must be certain; (3) the objects or persons intended to be benefited must be certain. It is conceded that in regard to 1 and 3 the requirements there set forth are

1. (1840) 3 Beav. 148 at 172: 49 E.R. 58.

In the matter of Universal Mutual Aid and Poor Houses Association, Ltd., Madras.

fulfilled in this case. But it is said that the subject-matter of the trust was not certain inasmuch as a specific sum was not mentioned. When a certificate-holder remitted to the company monies, he was remitting quite clearly 30 per cent. of that money to the company to be held by them in trust for the charity mentioned and 70 per cent. for that fund out of which personal benefits were expected to be gained. To my mind requirement No. 2 is amply fulfilled. In *Milroy* v. *Lord*[1], Lord Justice Turner at p. 181 says:

> "I take the law of this Court to be well-settled that, in order to render a voluntary settlement valid and effectual, the settlor must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property, and render the settlement binding upon himself. He may, of course, do this by actually transferring the property to the persons for whom he intends to provide, and the provisions will then be effectual; and it will be equally effectual if he transfers the property to a trustee for the purposes of t' e settlement, or declares that he himself holds it in trust for those purposes."

When a certificate-holder sent to the company monies which were transmitted periodically he was clearly communicating the object which was to be fulfilled in regard to the 30 per cent. and having, by accepting the certificate, undertaken the obligations contained in the certificate he did all that he had to do as visualised by Lord Justice Turner and a trust was there and then created; and the company from that time held the monies as trustees for carrying out the object of the trust. In the matter of this liquidation, donation certificates and bonds have been very fully dealt with by Stone, J., in his judgment in Application No. 2720 of 1933, in the course of which he expressed the view that the certificate-holders are entitled to 70 per cent. of the monies they subscribed to the company. The exact matter which is before me was not argued before Stone, J., but from his judgment I received great help. In my view the monies in the suspense account amounting to the sum I mentioned, namely, Rs. 2,335-2-10, should be allocated towards the trust and the charity which is mentioned in conditions Nos. 3 and 5 of the donation certificate issued by the company before it went into liquidation and the prayer of the Managing Official Liquidator is therefore granted.

Costs of the certificate-holders Rs. 75.

K. C. —— *Prayer granted.*

1. (1862) 7 L.T. Rep. 178.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE CORNISH.

Gopalakrishna Nayakar .. *Petitioner* (Defendant)*

v.

Madhavanayaki Ammal (deceased) and others .. *Respondents (Plaintiff and her L. Rs.).*

Gopalakrishna Nayakar *v.* Madhavanayaki Ammal.

Provincial Small Cause Courts Act (IX of 1887), Ss. 16, 33 and 35—Suit on promissory note—Small cause suit in nature—Prior District Munsif having small cause jurisdiction—Successor not having small cause jurisdiction—Suit re-numbered as original suit—Return of prior munsif—Suit not reconverted to small cause suit—Trial as original suit—Whether proper—Whether decree appealable.

S. 16 read with S. 33 of the Small Cause Courts Act makes it clear that a Court which has small cause jurisdiction cannot try a suit of a small cause nature otherwise than as a small cause suit. A small cause suit instituted as a small cause suit does not lose its character of a small cause suit by reason of it having been mistakenly transferred to the Original Side of the Court and tried as a regular suit.

Indra Chandra Mukherjee v. *Srish Chandra Banerjee*, (1913) I.L.R. 40 Cal. 537, *Shankarbhai* v. *Somabhai*, (1900) I.L.R. 25 Bom. 417 and *Ramaswami Muthirian* v. *Arunachalam Chettiar*, (1935) 69 M.L J. 443, relied on.

Bhagwati Pande v. *Badri Pande*, (1931) I.L.R. 54 All. 171, referred to.

Where a suit on a promissory note was instituted in the Court of a District Munsif as a small cause suit and he had small cause jurisdiction up to the pecuniary value of the suit but meanwhile another munsif occupied his place who had no small cause jurisdiction and hence recourse was had to S. 35 of the Provincal Small Cause Courts Act and the suit was re-numbered and registered as a regular suit, but before the suit came on for trial, the original munsif who had jurisdiction returned and consequently on account of S. 16 he had no jurisdiction to try the suit otherwise than as a small cause suit, though by some mistake the suit retained its altered number and description of a regular suit and was tried as a regular suit, and the question was whether the decree in the circumstances was appealable,

Held, that the appeal was not entertainable by the lower appellate Court.

Petition under S. 115 of Act V of 1908, praying the High Court to revise the order of the District Court of West Tanjore dated 8th February, 1935 and made in A.S. No. 3 of 1935 (O. S. No. 479 of 1933 on the file of the District Munsiff's Court of Mannargudi).

A. V. Viswanatha Sastri for Petitioner.

R. Gopalaswami Aiyangar for Respondents.

The Court delivered the following

JUDGMENT.—The petitioner in this Revision Petition was defendant in a suit on a promissory note. The District

* C. R. P. No. 679 of 1935. 2nd October, 1936.

Munsiff dismissed the suit. The plaintiff thereupon appealed to the District Court. The District Judge allowed the appeal and remanded the case for retrial on a particular issue. The petitioner challenges the jurisdiction of the District Judge to entertain the appeal and consequently to make any order in it.

Gopalakrishna Nayakar v. Madhavanayaki Ammal.

It appears that the suit was instituted in the Court of the District Munsiff as a small cause suit and that the District Munsiff at the time had small cause jurisdiction up to the pecuniary value of the suit. But this District Munsiff was transferred to another Court, and his place was taken by a Munsiff who had not the requisite small Cause jurisdiction. To meet this emergency recourse was had to S. 35 of the Provincial Small Cause Courts Act, and the suit was re-numbered and registered as a regular suit. Before the suit came on for trial the first munsif returned to that Court. Consequently he was competent to try this suit as a small cause suit; and, indeed, having regard to S. 16 of the Act he had no jurisdiction to try it otherwise. But evidently by some mistake, the suit retained its altered number and description as a regular suit and was tried as a regular suit. The question is whether the decree made in these circumstances is appealable. If the decree is to be deemed to have been passed in a regular suit, no doubt the general right of appeal given by S. 96, Civil Procedure Code, applies. On the other hand, if this decree is to be deemed to have been passed in a small cause suit S. 27 of the Act bars any right of appeal from that decree. It has been argued by the learned Advocate for the respondent that S. 27 can only apply where a decree is made under the provisions of the Small Cause Courts Act. His contention is that it is only when the Court is exercising small cause jurisdiction that the decree has a finality under S. 27. If the Court, though it has small cause jurisdiction, has in fact exercised its ordinary jurisdiction, S. 27 has no application. The question is undoubtedly a difficult one. But it is covered by authority. S. 16 read with S. 33 of the Act makes it clear that a Court which has small cause jurisdiction cannot try a suit of a small cause nature otherwise than as a small cause suit; and it has been held by a Bench in *Indra Chandra Mukherjee* v. *Srish Chandra Banerjee*[1] following a decision of the Bombay High Court in *Shankarbhai* v. *Somabhai*[2] that a small cause suit insti-

1. (1913) I.L.R. 40 Cal. 537. 2. (1900) I.L.R. 25 Bom. 417.

Gopalakrishna Nayakar *v.* Madhavanayaki Ammal.

tuted as a small cause suit does not lose its character of a small cause suit by reason of it having been mistakenly transferred to the Original Side of the Court and tried as a regular suit. A similar view was taken by Stone, J., in *Ramaswami Muthirian* v. *Arunachalam Chettiar*[1]. I think that the principle of those cases should govern this case. The learned Advocate for respondent has cited a Full Bench ruling in *Bhagwati Pande* v. *Badri Pande*[2]. But this ruling is not inconsistent with the authorities above referred to. All that was decided in the Allahabad case was that if a suit had been instituted as a small cause suit and then transferred to the Original Side because the Munsiff had not got jurisdiction to try the suit as a small cause suit, and was tried by him as a regular suit, then the suit has no other character than that of a regular suit, and a decree passed in it is appealable under S. 96.

For these reasons I think the petition must be allowed with costs throughout and the order of the lower appellate Court set aside.

K. C. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR M. VENKATASUBBA RAO, *Kt., Officiating Chief Justice* AND MR. JUSTICE HORWILL.

Ramanathan Chettiar, minor by next friend C. T. R. M. Chidambaram Chettiar .. *Appellant** (*Plaintiff*)

v.

S. R. M. M. C. T. M. Firm .. *Respondent* (*Defendant*).

Ramanathan Chettiar *v.* S.R.M.M.C. T.M. Firm.

Hindu Law—Joint family business—Sole member of coparcenary—Debts incurred by, for the business—Subsequent birth of a coparcenar—Mortgage by the old member alone executed after the birth of second coparcener—Suit and decree on mortgage—Only senior member impleaded individually—Decree if binding on junior member—Mortgage, if binding to the extent of debts incurred prior to his birth.

Of two undivided Nattukottai Chetti brothers *C* and *V*, who inherited and ran a banking business, *C* died in 1907 leaving behind him his widow. In 1922 a son *R* was born to *V*, who was adopted by the widow to *C* in 1924. In 1927 *V* effected a mortgage by deposit of title deeds in favour of the first defendant, who filed a suit thereon in 1932 impleading *V* alone and got a decree. *R* then filed this suit for a declaration that the decree was not binding on him.

Held, that assuming *V* was sued individually and not as representing the family, yet he effectively represented the entire family in the suit, as the

---

*O. S. Appeal No. 27 of 1935. 16th September, 1936.

1. (1935) 69 M.L.J. 443.
2. (1931) I.L.R. 54 All. 171.

Ramanathan Chettiar v. S.R.M.M.C. T.M.Firm.

mortgage extended to the entire interest of the family in the properties and the plaint claimed relief not only against the mortgagor personally but against the mortgaged property as well.

It was also contended for *R* that for such portion of the mortgage amount as was utilised for paying off a debt incurred before *R's* death, he cannot be held liable, as then *V* was the sole owner and he must not be deemed to have been acting on behalf of a non-existent joint family. It was found that there was no basis for that distinction as the amount borrowed was "for paying bank dues, for lending to others". But assuming that a portion of the debt was incurred before *R's* birth,

Held, that even then the after-born son *R* is liable for it, provided the debt was incurred for a justifiable purpose. A debt stands on a different footing from an alienation and although when the debts are incurred, the family consists of only one member he must be deemed in contracting debts to be acting on behalf of a potential joint family, and subsequent entrants into the family will become bound by the debts, provided the character of the debt is such as would bind them.

Veeranna v. *Sayamma*, (1928) 56 M.L.J. 401: I.L.R. 52 Mad. 398, discussed and distinguished as a case of an alienation.

On appeal from the judgment and decree of His Lordship Mr. Justice Lakshmana Rao dated the 30th day of July 1935 and made in exercise of the Ordinary Original Civil Jurisdiction of the High Court in C. S. No. 378 of 1934.

B. Sitarama Rao, K. Raja Aiyar and *V. Ramaswami Aiyar* for Appellant.

S. Doraiswami Aiyar and *K. S. Rajagopala Aiyangar* for Respondent.

The Judgment of the Court was delivered by

Venkatasubba Rao, Offg. C. J.

The Officiating Chief Justice.—This suit has been brought by the plaintiff for a declaration that he is not bound by the decree obtained in the High Court by the first defendant against the second, in C. S. No. 448 of 1932. The facts may be briefly stated. Chidambara, the undivided brother of the second defendant (Vairavan) died in 1907. The plaintiff who was born in 1922 is the natural born son of the second defendant but was adopted in 1924 to the deceased Chidambara by his widow Valliammal. A mortgage by the deposit of title deeds was granted on 30th May, 1927, by the second defendant to the first, to secure a debt of Rs. 50,000 and on that mortgage the first defendant brought the suit above-mentioned and obtained a decree. It is this decree that the plaintiff impeaches and seeks to get rid of.

The learned trial Judge on the Original Side has found first, that Chidambara and Vairavan, who were members of a Nattukottai Chetty Hindu family, inherited a banking concern,

Ramanathan Chettiar v. S.R.M.M.C. T.M. Firm.

Venkatasubba Rao, Offg. C. J.

which till Chidambara's death they both conducted and which thereafter the second defendant continued; secondly, that the plaintiff's family, while carrying on business as bankers, had dealings with the first defendant and the mortgage in question was granted in respect of a debt that had become due in the course of such dealings. Holding on these findings that the mortgage is binding upon the plaintiff and that he is bound by the decree, the learned Judge dismissed the suit.

The first contention urged by Mr. Sitarama Rao, is, that his client (the plaintiff) is not bound by the decree, as he was not made a party to the mortgage suit and the second defendant was not sued in a representative capacity, that is, as representing the family of which he was the manager. There is some evidence to show that R. M. M. S. T. Vairavan Chetty, impleaded as the defendant in the mortgage suit, is not the individual Vairavan but the family firm of which he was the manager. Granting, however, that the initials 'R. M. M. S.T.' do not convey this meaning and that the second defendant alone was individually impleaded, there can be no question on the authorities that he effectively represented in the suit the entire family, which has therefore become bound by the decree. In *Doulat Ram* v. *Mehr Chand*[1], the leading case on the point, their Lordships point out that where the mortgage extends to the entire interest of the family and is not confined to the share of any particular member and where in the plaint the mortgagee claims not only to recover against the individual mortgagor the amount of the mortgage but asks that the debt may be satisfied out of the mortgaged property—where these conditions are fulfilled, although the manager alone is impleaded, he effectively represents all the members, who therefore become bound by the decree. (See also *Sheo Shankar Ram* v. *Jaddo Kunwar*[2], *Sankaranarayana Pillai* v. *Rajamani*[3], and *Unnamalai Ammal* v. *Abboy Chetty*[4].) This contention of Mr. Sitarama Rao therefore fails.

Mr. Sitarama Rao next contends that if any part of the sum of Rs. 50,000 had been utilised in paying off a debt incurred before the plaintiff's adoption, for that portion of the debt, the plaintiff would not be liable. Whether this as a

1. (1887) L.R. 14 I.A. 187: I.L.R. 15 Cal. 70 (P.C.).
2. (1914) L.R. 41 I.A. 216: I.L.R. 36 All. 383 (P.C.).
3. (1923) 46 M.L.J. 314: I.L.R. 47 Mad. 462.
4. (1925) 50 M.L.J. 172.

Ramanathan Chettiar v. S.R.M.M.C. T.M. Firm.

Venkatasubba Rao, Offg. C. J.

proposition of law is correct or not, we shall examine presently; but the contention receives no support from the evidence on the record. The question put to the first defendant's agents and his answers on this point may be here reproduced.

Q.—So far as you know, you do not know what for he (Vairavan) borrowed this money?

A.—I know: for paying bank dues, for lending to others.

Q.—So the debts he borrowed were for discharging his old liabilities?

A.—I do not know all these details. He was taking all these things for his banking purposes.

This evidence remains uncontradicted and there is nothing to show that any portion of the amount borrowed was utilised for the payment of the debts incurred before the plaintiff's adoption. Here, I must point out, that the finding of the trial Judge that the debt was incurred for a legitimate purpose in the course of the carrying on of a family concern, has not been attacked. The evidence extracted above shows that the amount was borrowed "for paying bank dues, for lending to others," these being the natural incidents of a banking concern. Mr. Sitarama Rao's contention therefore is opposed to the facts proved and cannot be accepted.

Granting for a moment that a portion of the debt was incurred before the plaintiff's adoption, does that circumstance make any difference? Mr. Sitarama Rao has had to assume for his contention that the debts were incurred not only before the plaintiff's adoption but also before his birth. Before dealing with this contention, we may usefully refer to certain principles which may be regarded fundamental and have not been and cannot be controverted. The doctrine that a son is liable to pay his father's debts not incurred for immoral or illegal purposes, applies as much to debts incurred previous to, as after, his birth. Similarly, a nephew subsequently born is liable for the debts incurred by his uncle for purposes recognised by the Hindu Law as proper. This principle is incontestable and has been tacitly assumed or acted upon in several decisions (*Muttayan Chetti* v. *Sivagiri Zamindar*[1], *Muttayan Chetti* v. *Zamindar of Sivagiri*[2] on appeal from *Muttayan Chetti*

1. (1879) I.L.R. 3 Mad. 370 at bottom of p. 378.
2. (1882) L.R. 9 I.A. 128: I.L.R. 6 Mad. 1 (P.C.).

Ramanathan Chettiar v. S.R.M.M.C. T.M. Firm.

Venkatasubba Rao, Offg. C. J.

Sivagiri Zamindar[1], *Ponnambala Pillai* v. *Sundarappier*[2] and *Maharajā of Bobbili* v. *Zamindar of Chundi*[3]) and Mr. Sitarama Rao, as already stated, far from disputing it, affirms its correctness. There is a distinction in this respect between alienations and debts. In the case of alienations, whether they are for justifiable purposes or not, the person subsequently born or adopted cannot question them *Ponnambala Pillai* v. *Sundarappier*[2] and *Veeranna* v. *Sayamma*[4] but in the case of debts, as already pointed out, the character of the debt when incurred becomes the decisive element. Mr. Sitarama Rao, acceding to these propositions, puts his argument thus: From *Veeranna* v. *Sayamma*[4] it follows that the second defendant as the sole survivor of the family (this argument implies that the plaintiff had not even been born at the material time, that is, when a portion of the debts was incurred) was the absolute owner of the business assets. If that be so, the learned counsel proceeds to argue, the second defendant, when contracting those debts, acted on his own behalf and not as representing any Hindu coparcenary, which may be likened to a corporation. The next step in the argument is, that as the second defendant never purported to act on behalf of a coparcenary, the debts incurred by him cannot be binding upon the plaintiff, who having been subsequently born became by adoption his nephew. This position, which is said to be a logical deduction from *Veeranna* v. *Sayamma*[4] is untenable and we cannot accept it as sound. That case related to an alienation and not to a debt. There, it was argued that so long as any widow remained in the family possessing an unexercised power of adoption, no alienation by way of gift made by the last surviving male member could be binding upon the son subsequently brought into the family by adoption. This contention was repelled as being opposed to the basic principles of Hindu Law. In the judgments delivered in that case, the theory that the last survivor is no more than a provisional heir, based upon the fiction of relation back in the case of such adoptions, was repudiated. The effect of the decision is no doubt that for the purpose of alienations the sole survivor is regarded as the absolute owner, but we agree with Mr. Doraiswami Aiyar that

1. (1879) I.L.R. 3 Mad. 370.
2. (1897) 7 M.L.J. 240 : I.L.R. 20 Mad. 354 at 356.
3. (1910) 21 M.L.J. 593 : I.L.R. 35 Mad. 108.
4. (1928) 56 M.L.J. 401 : I.L.R. 52 Mad. 398.

it would be wrong to apply the principle to the case of debts by extending the analogy. The property in the hands of the sole survivor is separate property which, however, must not be confused with self-acquired property; what is separate property becomes, on the introduction of a fresh member into the family, ancestral property with all its incidents. Similarly, although when the debts are incurred, the family consists of a single male member, he must be deemed in contracting debts to be acting on behalf of a potential joint family, which is capable by expansion of comprising more than one member. Viewed in that light, the act of the last single survivor must be deemed as that done in a representative capacity, that is to say, as representing a potential joint family. Mr. Sitarama Rao had been driven to concede, that if at the time a debt is incurred there happen to be two or more members instead of a single surviving member, the foundation on which his contention rests, disappears. That is the reason why he has had to confine his argument to the period not before the plaintiff's adoption which was in 1924 but before his birth which was in 1922. It would be a strange thing to hold in a matter of this sort, that where there are two or more survivors, a different legal consequence would follow than from where there is a single survivor. Indeed to accept Mr. Sitarama Rao's contention would lead to grave anomalies and leave this branch of the Hindu Law in a most confused state. Nothing that has been shown compels us to take such a view.

In the result, the appeal fails and it is dismissed with costs.

S. V. V. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE MOCKETT AND MR. JUSTICE LAKSHMANA RAO.

Nimmagadda Mahalakshmamma and another .. *Appellants* (Petitioners-Defendants)*

v.

Nimmagadda Ramayya .. *Respondent (Respondent-Plaintiff).*

Mahalakshmamma *v.* Ramayya.

Civil Procedure Code (V of 1908), Ss. 144 and 151—Pauper suit—Defendants directed to pay Court-fee to Government—Appeal—Reversal of order —Application for restitution—Award of interest on court-fee paid—Discretion of Court.

* A. A. O. No. 524 of 1934. 27th October, 1936.

Mahalakshmamma *v.* Ramayya.

Where the defendants in a pauper suit were directed by the decree passed by the trial Court to pay a certain sum of money by way of court-fee to Government but in appeal that order was reversed and the plaintiff was ordered to pay the court-fee, and thereupon the defendants applied to the trial Court under Ss. 144 and 151, Civil Procedure Code, praying that they were entitled to recover interest on the amount paid by them as Court-fee,

Held, that the amount paid to Government as court-fee in the pauper suit was not money liable to be dealt with by way of restitution under S. 144, Civil Procedure Code, and that interest could not be awarded to the petitioners thereunder. Restitution implies money paid by one party to the other or to the credit of the other and a restoration of that money with interest to the person entitled to it by the person to whom or to whose credit it was originally wrongly paid under orders of Court.

Held. further, that though it was open to the Court to award interest to the petitioners under S. 151, Civil Procedure Code, it need not pass such an order in view of the particular circumstances of the case.

Rodger v. *The Comptoir D'Escompte de Paris*, (1871) L.R. 3 P.C. 465, considered.

Appeal against the Order of the Court of the Subordinate Judge of Bapatla dated 14th July, 1934 and made in E. A. No. 133 of 1934 in O. S. No. 47 of 1923.

V. Subramanyam and *V. Satyanarayana* for Appellants.

Y. Suryanarayana for Respondent.

The Judgment of the Court was delivered by

Mockett, J.

Mockett, J.—In this pauper suit the petitioners-defendants were by the original decree ordered to pay Rs. 682-7-0 Court-fee to Government. On appeal that order was reversed and the plaintiff was ordered to pay the court-fee. The petitioners applied to the trial Court under Ss. 144 and 151, Civil Procedure Code, praying that interest on the above amount should be paid to them by the respondent. We do not consider that money paid to Government in a pauper suit by way of court-fee can be held to be money liable to be dealt with by way of restitution, under S. 144, Civil Procedure Code. Restitution seems to imply money paid by one party to the other or to the credit of the other and a restoration of that money with interest to the person entitled to it by the person to whom or to whose credit it was originally wrongly paid under orders of Court. In this case the Government are the recipients of the money.

But while holding the above we consider that S. 151 may well apply to such a case as this. The principle underlying the whole matter has been laid down in the case of *Rodger* v.

Mahalakshmamma *v.* Ramayya.

Mockett, J.

The Comptoir D'Escompte de Paris[1] which case has been the subject of numerous decisions in India. But S. 151 is discretionary. We have perused the judgment of the appellate Court and we observe that the learned Judges agreed with the finding of fact imputing the putting up of a false case with regard to an adoption by the petitioners. They also made no order as to the costs of the memorandum of objections which related to the question of court-fee. For the above reasons and generally on a consideration of the facts we do not consider this is a case for awarding interest under S. 151, Civil Procedure Code. The appeal is therefore dismissed with costs.

B. V. V. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW AND MR. JUSTICE K. S. MENON.

Vijiathammal .. *Appellant* (Plaintiff)*

v.

M. Kadir Sultan and another .. *Respondents (Defendants 1 & 2).*

Vijiathammal *v.* Kadir Sultan.

Principal and agent—Power-of-attorney—Construction—Principals export and import merchants—Power to purchase goods—If includes power to borrow in general or receive deposits—Liability of principal for moneys deposited with agent.

A power-of-attorney is to be construed strictly and where a particular act of the agent is challenged as in excess of the authority given to him by the power-of-attorney, it is necessary, for those who rely on it to show that on a fair construction of the entire instrument the authority is to be found within the four corners of the instrument either in express terms or by necessary implication.

Where the principals, who were merchants carrying on trade in the shape of export and import of goods and were not doing business of receipt of deposits from others, executed a power-of-attorney authorising the agent to purchase goods, and the plaintiff deposited some moneys with the agent which did not go into the firm's accounts and it was not suggested that the money was borrowed for the purpose of paying for any goods which the agent was authorised to purchase on behalf of his principals.

Held, that the principals were not liable as (*i*) it was beyond the agent's authority and (*ii*) the defendants did not derive any benefit therefrom; that an authority to purchase goods does not include a general power to borrow or to receive deposits, except probably where the loan was for the purpose of paying for any goods which the agent was authorised by the instrument to purchase on behalf of his principals or the money has been received as part of the business carried on by him on behalf of his principals. Even if there were a power to borrow, it would not necessarily imply a power to receive deposits, as it is common knowledge that traders in goods do not make it part of their business to receive deposits.

1. (1871) L.R. 3 P.C. 465.

* L. P. Appeal No. 68 of 1935. 11th August, 1936.

Vijiath-ammal *v.* Kadir Sultan.

Appeal under Cl. 15 of the Letters Patent against the decree of the Hon'ble Mr. Justice Varadachariar in S. A. No. 482 of 1931* preferred to the High Court against the decree of the Court of the Subordinate Judge of Negapatam in A. S. No. 59 of 1929 preferred against the decree of the Court of the District Munsif of Negapatam in O. S. No. 229 of 1927.

Material portions of Copy of Power-of-attorney dated 29th July, 1921, Ex. I, in the case:—

Whereas I, Sultan Marakkayar, son of Kadir Kanni Marakkayar, Mussalman, merchant, living in Karaikal and Mr. Kadir Sultan Avargal, son of Muhammad Thambi Sirang of the above caste, profession and religion, have entered into a partnership, under a partnership agreement, dated 4th April, 1916, in pursuance of which we have started partnership business in Karaikal, Madras, Negapatam, Nagore and other places under the name and style of "The India and Straits Company". Our Negapatam branch of the above partnership firm was started on 18th July, 1918. Whereas I am the managing partner under the said partnership agreement, and since it is not convenient for me to supervise and look after the partnership business in the various branches of " The India and Straits Company", personally, and as I and the other partner M. Kadir Sultan Avargal are anxious to appoint a fit and proper person as our-agent under a general power-of-attorney for the purposes hereinafter mentioned. Know ye all men by these presents that I, the said Sultan Marakkayar, in my own capacity and on behalf of my partner the said M. Kadir Sultan Avargal and in my capacity as managing partner of the said firm of " The India and Straits Company ", by virtue of the powers given to me by the above partnership agreement, do hereby constitute, nominate and appoint Shanmugam Pillai, son of Appaswami Pillai, Vellala, Saivite, living in Negapatam, to be our true and lawful attorney for purposes hereinafter mentioned, *viz.*, to enter into agreements, contracts, etc., on behalf of the partnership branch at Negapatam, to purchase goods, to sell the same, to obtain lease of buildings, godowns, etc., to execute documents, and get counter-parts necessary for the said business, to sign and receive hundials, to make payments and receive payments, to realise or collect amounts or arrears or outstandings due to the firm of " The India and Straits Company", whether in respect of the Negapatam branch or in respect of the other branches that are now existing or that may hereafter be established, to give receipts for the amounts collected to settle claims whenever necessary, to compromise or adjust the

---

* 69 M.L.J. 179.

amounts and claims due, to purchase properties in lieu of the amounts due, to make remissions and generally to take all steps that the said agent deems fit, proper and necessary for the safe, efficient and proper management of the partnership business.

* * * * * *

To sign and acknowledge hundials, telegrams, etc., and to deposit amounts and withdraw amounts from the Madras Bank at Madras and Negapatam as well as in all its branches in Madras Presidency, from the Mercantile Bank, National Bank, the Chartered Bank, and other banks at Madras and other places, to sign the necessary documents or vouchers as the occasion requires and to get the necessary documents or vouchers signed as the case may be and in fact to do all and necessary transactions with those Banks in respect of our said firm.

To appoint or dispense with clerks or servants as the said agent pleases in respect of the business at Negapatam . . . and in fact to do all acts that may be necessary for the safe, proper and efficient conduct of the said business of the said firm.

All acts, deeds and things done by my said attorney shall be construed as acts, deeds and things done by me personally and I do hereby ratify and agree to ratify and confirm all acts done by my said attorney by virtue of these presents.

In witness thereof, I do hereunto set my hand, this 29th day of July, One thousand nine hundred and twenty-one.

K. R. Rama Aiyar for Appellant.

T. S. Venkatesa Aiyar for Respondents.

The Judgment of the Court was delivered by

Pandrang Row, J.

Pandrang Row, J.—This is a Letters Patent Appeal from the Judgment of Varadachariar, J., dated 12th March, 1935, in S. A. No. 482 of 1931*. The plaintiff who is the appellant sued to recover a sum of Rs. 1,000 with interest thereon and her case was that that amount was deposited by her with the firm of defendants 1 and 2 at Negapatam on 21st November, 1924, the actual payment having been made to the third defendant who was then the local agent of the firm of defendants 1 and 2. Defendants 1 and 2 denied that the firm was bound by the transaction which the agent had no power to enter into on their behalf and it was also contended that the transaction was not entered in the books of the firm and the firm did not get the benefit of the money in question. In other words they disclaimed their liability altogether. The plaintiff had asked

* 69 M.L.J. 179.

Vijiathammal *v.* Kadir Sultan. — Pandrang Row, J.

for a decree in the alternative against the third defendant in case she was not able to establish the liability of defendants 1 and 2. In the trial Court there was a decree against defendants 1 and 2 as well as against the third defendant but in appeal the Subordinate Judge of Negapatam dismissed the suit as against defendants 1 and 2. From that judgment the second appeal was preferred and it was dismissed with costs. The main question in the second appeal was whether as a matter of fact the power-of-attorney granted by defendants 1 and 2 to the third defendant gave authority to borrow on behalf of his principals. On this point the opinion of Varadachariar, J., was that the power-of-attorney did not authorise the third defendant to borrow money for or on behalf of his principals. The authorities which bear on this point have been discussed by our learned brother in his judgment and it is unnecessary to embark on a further discussion, because to our minds the point is very simple and scarcely leaves room for any doubt. The authorities do not seem to be of much use in deciding the effect or purport of the particular power-of-attorney which we have to deal with in this case. The authorities deal with documents worded differently. As to the general principle applicable to cases of this kind there is no dispute, *viz.*, that a power-of-attorney is to be construed strictly, that is to say, where a particular act is alleged to have been done under a power-of-attorney and that allegation is challenged and it is contended that the act was in excess of the authority given by the power of attorney, it is necessary to show that on a fair construction of the entire instrument the authority in question has to be found within the four corners of the instrument either in express terms or by necessary implication. The principle has been laid down almost in exactly these words in *Bryant Powis and Bryant* v. *La Banque du Peuple Bryant*: *Powis and Byrant* v. *Quebec Bank*[1] by Lord Macnaghten at p. 177. Bearing this principle in mind we have examined the power-of-attorney and we are unable to find any reason for differing from the opinion expressed by the learned Judge who heard the second appeal. There is no doubt authority given to purchase goods, the principals being merchants carrying on trade in the shape of export and import of goods. It is contended that a power to purchase goods includes power to borrow. This contention we

1. (1893) A.C. 170.

Vijiathammal v. Kadir Sultan. — Pandrang Row, J.

are unable to accept. The conclusion may perhaps be different if the question arises whether a power to purchase goods implies power to pay for them. That is not the case here. It is not the plaintiff's case that the money was borrowed from her for the purpose of paying for any goods which the third defendant was authorised to purchase on behalf of his principals. On the other hand her own case in the plaint is that she made a deposit of the money. In other words what she did was consistent only with her belief that the principals (defendants 1 and 2) were carrying on a business which involved also the receipt of deposits from others. There is no instance brought to our notice in the evidence of any such deposit having been received on behalf of defendants 1 and 2 at any time; nor is there anything to show that receiving deposits and paying interest thereon was part of their business. One might even go to the extent of saying that even if there was power to borrow it would not necessarily imply a power to receive deposits and carrying on a banking business of this kind. In this case however we are satisfied that the power-of-attorney does not at all include a general authority to borrow on behalf of the principals and certainly there is no authority whatever to receive deposits of the kind referred to in the plaint. Neither the power-of-attorney nor the course of business carried on justifies the inference that the plaintiff believed in good faith that the deposit was made with the principals and not with the third defendant personally. It is common knowledge that traders in goods do not make it part of their business to receive deposits of this kind, and it is going too far to suggest that in this particular case there was sufficient ground for believing that the third defendant was acting on behalf of his principals when he received the deposit in question. As a matter of fact the plaint itself rests on the allegation that defendants 1 and 2 carried on as a part of their business the business of receiving moneys as deposits and repaying the same with interest. This allegation is undoubtedly untrue and devoid of foundation. No attempt has been made to substantiate it. The accounts of the firm do not show any such transactions. The allegation in the plaint, unfounded as it was, shows that the plaintiff had realised it was not possible to bring home liability to defendants 1 and 2 unless it was established that her money had been received by the third defendant as part of the business carried on by him

Vijiathammal *v.* Kadir Sultan.

Pandrang Row, J.

on behalf of his principals. As observed already, there is no foundation for this allegation and there can be no doubt that defendants 1 and 2 never received deposits as part of their business either themselves or through their agent at any time. In particular the plaintiff's money never went into the firm's accounts and it is not shown that the firm had any benefit therefrom. Thus even on the ground of benefit received the plaintiff has no cause of action because no such benefit has been established. Her cause of action is entirely limited to the 3rd defendant and she has got a decree against him. The claim to recover the money from defendants 1 and 2 is baseless, and it was rightly rejected by the lower appellate Court and in our opinion the judgment of our brother Varadachariar, J., dismissing second appeal is perfectly right. The Letters Patent Appeal is therefore dismissed with costs.

S. V. V. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VARADACHARIAR.

Meenakshi Ammal and another .. *Appellants* (Plaintiffs)*

v.

Ramaswami Josier and another .. *Respondents (Defendants).*

Meenakshi Ammal *v.* Ramaswami Josier.

Hindu Law—Daughter's illegitimate daughters—Claim to grandmother's properties—Existence of legitimate but more distant relatives—Rights by heirship whether vesting in the illegitimate grand-daughters.

The general principle of the Hindu Law is undoubtedly to limit heirship to legitimate issue but in the case of illegitimate sons amongst Sudras a special exception has been made by the texts. One should ordinarily have thought (on the analogy of the principle *ex pressio unius*) that this itself is a clear indication against recognising similar exceptions by way of analogy.

Suits were brought by the illegitimate daughters of a daughter for possession of their grandmother *M's* properties which were resisted by the defendants who claimed through *M's* sister's son's son; and the question arose whether the plaintiffs could succeed when there were legitimate though more distant heirs in existence,

Held, the defendants would exclude the claims of the daughter's illegitimate daughters.

P. 763 of Ghose's Hindu Law (3rd Ed.) referred to.

Subramania Aiyar v. *Ratnavelu Chetty*, (1917) 33 M.L.J. 224: I.L.R. 41 Mad. 44 (F.B.) and *Dundappa* v. *Bhimawa*, (1920) I.L.R. 45 Bom. 557, referred to.

---

*S. A. No. 1279 of 1932. 4th November, 1936.

Meenakshi Ammal v. Ramaswami Josier.

Second appeal against the decree of the District Court of West Tanjore in A. S. No. 262 of 1931 preferred against the decree of the Court of the District Munsiff of Tiruvadi in O. S. No. 41 of 1931.

The facts of the case as stated in the lower appellate Court's judgment are as follows:—

" These are appeals by the defendants in three suits brought by the two common plaintiffs. The suits were for possession with mesne profits of the property belonging to one Murugayi and they have been decreed. The plaintiffs are the daughters of Murugayi's daughter Dharmu Ammal and claim to be Murugayi's nearest heirs. The defendants claimed through one Venkatachala Chetty, Murugayi's sister's son's son. Their claim was based on his alleged right of inheritance and on the gift deed, Ex IV, executed in his favour by Dharmu Ammal. The latter claim was found against them in the lower Court and this was not argued in appeal, in which the appellants confined themselves to their claim through Venkatachala as the nearest heir of Murugayi. Admittedly Dharmu was the legitimate daughter of Murugayi and the plaintiffs are Dharmu's illegitimate daughters. It was alleged that the plaintiffs were themselves excluded by unchastity and the District Munsif found there was evidence that the first plaintiff was living with a man she was not married to, that there was no evidence of immorality of the second plaintiff, and that neither of them had been outcasted and he held that there was nothing in this matter of their unchasity to affect their claim. That has not been argued in appeal. The question we have to consider is only the effect of their illegitimacy on their claim to inherit from their grandmother. This was issue (1) in each of the suits.

The District Munsiff on this matter referred to three cases *Minakshi* v. *Muniandi Panikkar*[1], *Subramanian Chetti* v. *Arunachalam Chetti*[2] and *Kasturi* v. *Lote Major*[3]. The first of these cases which was that principally relied on by the appellants he holds not to apply to the present case. The District Munsiff says "that case cannot possibly apply to the facts of the present case, for there the question arose as to who were the heirs of a degraded woman or a prostitute. His Lordship Justice Seshagiri Aiyar in whose judgment Mr. Justice Oldfield, concurred in the main, observes at page 1154 after considering the relevant texts and the decisions that the illegitimate children of a prostitute have no rights of inheritance under the Hindu Law as obtains in this Presidency as against legitimate heirs. But the question for con-

1. (1914) 27 M.L.J. 353: I.L.R. 38 Mad. 1144.
2. (1904) I.L.R. 28 Mad. 1.
3. (1920) 56 I.C. 952.

Meenakshi Ammal *v.* Ramaswami Josier.

sideration in the present case is not who are the heirs of a prostitute's properties—illegitimate children or legitimate heirs." He also remarks that in *Minakshi* v. *Muniandi Panikkar*[1] the competition was between a legitimate son and an illegitimate daughter and that in *Kasturi* v. *Lote Major*[2] the right of an illegitimate daughter to inherit the property of her mother when there were no other nearer heirs was recognised. The District Munsif finds, apparently as the immediate inference to be drawn from these decisions, that the plaintiffs are the nearest heirs of Murugayi.

This appears to miss the point of the case as I understand it, which is not whether Dharmu could though unchaste succeed to her mother or whether the plaintiffs though illegitimate and perhaps unchaste could succeed to Dharmu, but (i) whether the plaintiffs being the illegitimate daughters of a daughter are heirs of Murugayi and (ii) if so, whether they can succeed when there are legitimate though more distant heirs in existence. I do not raise the question of whether Venkatachala Chetty was or was not an heir of Murugayi as that was not argued in appeal and appears to have been admitted.

In Gour's Hindu Code, S. 290 the law is stated to be that in the absence of legitimate issue, illegitimate issue inherit stridhanam, daughters taking before sons. In Mulla's Hindu Law. S. 163, it is stated that illegitimate children are not excluded from inheritance to their mother's stridhana but legitimate children are preferred to them. The daughter of a daughter appears as the next heir to stridhanam after the daughter, but neither of these rules and none of the cases referred to deal with the case of a daughter's daughter who is illegitimate, unless we are to interpret "issue" in Gour and "children" in Mulla as including grandchildren. There is therefore no authority either for or against the claim of an illegitimate grand-daughter, but in the cases dealing with the claim of illegitimate children there does not appear to exist any principle such as that illegitimacy is an absolute bar with a special exception in the case only of a daughter and it appears to me that it would be unreasonable to hold that that could be the case. It would be more logical and consistent to hold that the effect of illegitimacy is the same in the case of a daughter's daughter as in the case of a daughter and that a daughter's daughter though illegitimate is an heir.

The question however arises as to whether a daughter's illegitimate daughter is a nearer heir than a sister's grandson. The District Munsif has not discussed this question and does not appear

1. (1914) 27 M.L.J. 353: I.L.R. 38 Mad. 1144.
2. (1920) 56 I.C. 952.

Meenakshi Ammal *v.* Ramaswami Josier.

to have recognised its importance for in referring to *Kasturi* v. *Lote Major*[1] he says that the right of the illegitimate daughter was recognised when there were no other "nearer" heirs but what the judgments really said was not "nearer" but "preferential" heirs and in its reference to *Minakshi* v. *Muniandi Panikkar*[2] that judgment referred to the "absence of legitimate heirs". In *Minakski* v. *Muniandi Panikkar*[2] the head-note appears to be inaccurate as it says "Illegitimate children (except among the Sudras) are not heirs especially under the Mitakshara system to succeed to the property of any kind left by either of their parents" but I cannot find anything in the judgments equivalent to that. It was a case of competition between a legitimate son and an illegitimate daughter. It was held that the son was the nearest heir. But the following passages will show that the judgment of neither Judge was intended to mean that an illegitimate daughter could not be an heir. P. 1146 (referring to a decision in a previous case, *Narumayya Chetti* v. *Tiruvengadathan Chetti*[3]:

> "The decision is in accordance with this view, there being nothing in its reference to the rights of illegitimate children inconsistent with their postponement to all legitimate heirs".

P. 1151:

> "Illegitimate children have no place in Hindu Law when there are legitimate heirs except in the special case already referred to (the case of a Sudra)".

P. 1152:

> "I do not see that any consideration of equity can arise in favour of the illegitimate offspring as against the legitimate".

P. 1154:

> "Upon a review of the texts bearing on the question and of the decisions based on them my conclusion is that the illegitimate children of a prostitute have no rights of inheritance under the Hindu Law as obtains in this Presidency as against legitimate heirs".

This decision is referred to in *Kasturi* v. *Lote Major*[1] as not dissenting from the rulings to the effect that illegitimate daughters can succeed in the absence of legitimate heirs. Nothing is said in any of these decisions as to the nearness of the legal heirs to enable them to take precedence over illegitimate heirs as that was not necessary for the facts they were dealing with. But the principles on which these cases were decided do not seem to imply that the effect of illegitimacy is just to counterbalance a certain difference in the nearness of relationship of the heirs but (and the passages I have quoted have special reference to this) that any legitimate heir

---

1. (1920) 56 I.C. 952.
2. 27 M.L.J. 353: (1914) I.L.R. 38 Mad. 1144.
3. (1912) 24 M.L.J. 223.

Meenakshi Ammal v. Ramaswami Josier.

excludes an illegitimate daughter, and therefore certainly also an illegitimate grand-daughter.

I do not therefore agree with the District Munsif that it can be inferred from these authorities that the plaintiffs are the nearest heirs of Murugayi. I would say that although they are heirs they are excluded by Venkatachala Chetty who was entitled to inherit Murugayi's property."

K. S. Desikan for Appellants.

M. Krishna Bharati for *S. Muthiah Mudaliar* for Respondents.

The Court delivered the following

JUDGMENT.—The parties are governed by the ordinary Hindu Law and not by any rule of custom as in the case of dancing girls. The general principle of the Hindu Law is undoubtedly to limit heirship to legitimate issue but in the case of illegitimate *sons* amongst Sudras a special exception has been made by the texts. One should ordinarily have thought (on the analogy of the principle *ex pressio unius*) that this itself is a clear indication against recognising similar exceptions by way of analogy. The decision in *Subramania Aiyar* v. *Rathnávelu Chetty*[1] proceeds on the footing that as the special text relating to the illegitimate *son* must proceed on the footing of a recognition of sapindaship between the illegitimate son and his putative father, the latter may well be held to be a sapinda of the illegitimate son and as such entitled to inherit his property. There is no scope for the extension of this reasoning by analogy. Similarly the recognition of a right of inheritance as between the mother and the illegitimate daughter (*Dundappa* v. *Bhimawa*[2] will not warrant an extension of sapindaship to other relations because in that very case the learned Judges were not prepared to postulate sapindaship between the putative father and the illegitimate daughter. The opening sentence in p. 763 of Ghose's Hindu Law (3rd Edition) restricts the illegitimate child's inheritance to the mother's property. The decision of the lower appellate Court is right and the second appeal must be dismissed with costs.

(Leave to appeal granted.)

K. C. —— *Appeal dismissed.*

---

1. (1917) 33 M.L.J. 224: I.L.R. 41 Mad. 44 (F.B.).
2. (1920) I.L.R. 45 Bom. 557.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE K. S. MENON.

O. A. O. K. C. T. Chidambaram Chettiar (minor) and others .. *Appellants** (*Plaintiffs*)

v.

Swaminathan *alias* Samidurai Thevar and others .. *Respondents* (*Defendants 1 and 3 to 7.*)

Chidambaram Chettiar *v.* Swaminathan.

Civil Procedure Code (V of 1908), O. 22, r. 9—Suit by benamidar—Benamidar's death before decree—No legal representatives added—Abatement of suit—Subsequent suit by real owner—If competent.

Where before the decree in the suit by a benamidar to recover possession of properties from the defendants, the benamidar died and as his sons declined to come on record in the suit and an application by the real owner to be added as legal representative was also dismissed, an order was passed declaring the suit as abated, a subsequent suit by the real owner for the same relief, is barred by O. 22, r. 9, Civil Procedure Code and is incompetent. It cannot be said that *R* had no legal representative in respect of the benami right litigated by him in the prior suit, as his sons have an interest by virtue of which they could have been brought on record as legal representatives before the decree in the suit, though when the question arises after the decree under S. 47 (3), it may be that they may not have such a right in preference to the real beneficiaries.

Bada Kristam Naidu v. *Durvada Patrudu,* (1927) 53 M.L.J. 568, distinguished as a case after decree.

Appeal against the decree of the District Judge of East Tanjore at Negapatam in A. S. No. 84 of 1931, presented against the decree of the Court of the District Munsiff of Tiruthuraipundi in O. S. No. 109 of 1930.

K. S. Champakesa Aiyangar for Appellants.

K. S. Jayarama Aiyar for Respondents.

The Court delivered the following

JUDGMENT.—The suit is to recover possession of the plaint lands with past and future mesne profits. It is alleged that that property was purchased in Court auction by one Ramaswami Chettiar in 1923, that the said Ramaswami Chettiar was merely a benamidar for Chidambaram Chettiar, the father of the plaintiff, that on the defendants obstructing the said Ramaswami Chettiar in taking possession of the property, the latter filed O. S. No. 88 of 1925 on the file of the District Munsiff of Tiruthuraipundi, that as he died during the pendency of the suit and no legal representative of his was brought on

* S. A. No. 680 of 1932. 7th May, 1936.

Chidambaram Chettiar *v.* Swaminathan.

record the suit abated and that in spite of it the plaintiffs, being the beneficial owners, are entitled to maintain the suit. The defendants contended that the suit is barred by O. 22, r. 9 of the Civil Procedure Code, as the cause of action is the same as that in O. S. No. 88 of 1925. That plea of the defendants was upheld by both the lower Courts; hence this second appeal, by the plaintiffs.

The only question for decision is whether the suit is barred by O. 22, r. 9 of the Civil Procedure Code. It is not disputed that the cause of action in this suit is the same as that on which O. S. No. 88 of 1925 was based, *viz.*, the right of the plaintiffs or their benamidar Ramaswami Chettiar to get possession of the property and the infringement of that right by the defendants. It is also not disputed that on the death of Ramaswami Chettiar his representatives were not brought on record and an application filed by the plaintiffs to bring them on record as legal representatives was ultimately dismissed by the High Court. The result was that no one was brought on record as the representative of Ramaswami Chettiar and that an order was made that the suit abated. Now, under O. 22, r. 9 of the Civil Procedure Code:

"Where a suit abates or is dismissed under this order, no fresh suit shall be brought on the same cause of action".

The contention of the defendants therefore is as that O.S. No. 88 of 1925 abated and as the cause of action for that suit and this is the same this suit is incompetent. The learned advocate for the appellant answers that there was no legal representative for Ramaswami Chettiar in respect of the right litigated by him in O. S. No. 88 of 1925 and that therefore the suit never abated by reason of such legal representative not having been brought on record and that the order that the suit abated is wrong. The question therefore for decision is whether Ramaswami Chettiar had any legal representative in respect of the right litigated by him in O. S. No. 88 of 1925. Admittedly, he has sons who, the plaintiffs allege, declined to come on record. The question is whether they could be regarded as his legal representatives. By "legal representative" is meant a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued. *Vide* S. 2 (11) of

Chidambaram Chettiar *v.* Swaminathan.

the Civil Procedure Code. It cannot be denied that if Ramaswami Chettiar was benamidar for the plaintiffs he is in some sense of the term a trustee for the plaintiffs and his sons could succeed to that trusteeship. This position is clear from the following observations of the Judicial Committee in the case of *Raja of Deo* v. *Abdullah*[1]:

"When, therefore, Lajjadhari executed the conveyance in favour of Rajeswari at the instance of Raja Bhikham, he (Raja Bhikham) was the true owner. Kashinath was a trustee for Raja Bhikham, and Lajjadhari could only succeed to his father's trusteeship".

Relying on these observations, this Court (Sundaram Chettiar, J.) held in the case of *Muhammad Sheriff* v. *Sayyed Kasim*[2], that the transferee from the heirs of a benamidar mortgagor had some interest entitling him to maintain a suit to redeem. It was observed:

"But here, the suit was filed by the transferee from the heirs of the alleged benamidar. The question is whether anything survives to the heirs or their assignees after the death of the benamidar. In the decision of the Privy Council in *Raja of Deo* v. *Abdullah*[1], their Lordships, dealing with status of a benamidar, have observed at pp. 918 and 919 that he would be a trustee for the real owner, and his son could succeed to the trusteeship. This shows, that the heirs of the benamidar, would, by reason of some interest devolving on them, be entitled to maintain a suit of this kind".

It is however pointed out for the appellant that in another case, *viz.*, *Bada Kristam Naidu* v. *Durvada Patrudu*[3], Mr. Justice Odgers was not inclined to consider the decision of the Privy Council referred to above as laying down that a trusteeship devolved on the deceased benamidar's legal representative. But the question for decision there was whether, when the benamidar dies after obtaining a decree, his legal representatives are entitled to come on record in preference to the beneficiary. There was no question there whether the legal representative had any interest entitling him to come on record before the decree was obtained. If as their Lordships of the Privy Council observed, the benamidar is a trustee and his son could succeed to the trusteeship, it is clear that Ramaswami Chettiar's sons had some interest by virtue of which they could have been brought on record as legal representatives, though it may be that when the question is considered under S. 47 (3) they may not have such a right in preference to the real beneficiaries. Having regard to the dictum of the Judicial

1. (1918) 35 M.L.J. 46: L.R. 45 I.A. 97: I.L.R. 45 Cal. 909 at 918 and 919 (P.C.).
2. A.I.R. 1933 Mad. 635.
3. (1927) 53 M.L.J. 568.

Chidambaram Chettiar *v.* Swaminathan.

Committee and the decision of this Court in *Muhammad Sheriff* v. *Sayyed Kasim*[1], I am inclined to hold that the sons of Ramaswami Chettiar can be considered as his legal representatives in respect of the right litigated in the previous suit and that they, not having been brought on record within the time allowed, the suit abated. It follows that O. 22, r. 9 is a bar to this suit. The decree of the lower Court is therefore confirmed and the second appeal is dismissed with costs.

S. V. V. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BURN AND MR. JUSTICE LAKSHMANA RAO.

Minor Ramanathan and another.. *Appellants** (*Petitioners*)

v.

Sp. Rm. R. M. Meyyappa Chettiar .. *Respondent* (*Respondent*).

Ramanathan *v.* Meyyappa Chettiar.

Civil Procedure Code (V of 1908), O. 9, r. 13—Minor—Guardian ex parte *—Delaying tactics—If mere absence sufficient cause.*

Unless it appears that the guardian has in allowing the decree to be passed *ex parte* betrayed the interests of the minors, the mere absence of a guardian *ad litem* is not by itself a sufficient cause to allow an application under O. 9, r. 13, Civil Procedure Code.

Appeal against the order of the Court of the Subordinate Judge of Sivaganga, dated 15th February, 1935 in I, A. No. 3 of 1935 in O. S. No. 26 of 1932.

S. R. Muthuswamy Aiyar for Appellants.

N. G. Krishna Aiyangar for Respondent.

The Court delivered the following

JUDGMENT.—The mere absence of a guardian *ad litem* is not by itself a sufficient cause for allowing an application under O. 9, r. 13, Civil Procedure Code. Vide *Peda Satyam* v. *Krishnamurthy*[2], where it is pointed out that a guardian *ad litem* may have perfectly good reason for refusing to put forward a defence on behalf of a minor. We may observe that there is another class of cases, of which this appears to be an instance. It is quite possible for a guardian *ad litem* knowing that the minor has no defence to the suit, to protract

---

1. A.I.R. 1933 Mad. 635.
2. (1935) 68 M.L.J. 693: I.L.R. 58 Mad. 1045.

* A. A. O. No. 326 of 1935. 28th August. 1936.

Ramanathan *v.* Meyyappa Chettiar.

and delay the proceedings by all the varied devises which are commonly practised. When these are exhausted, a further stratagem is to allow a decree to be passed *ex parte* and then apply to have it set aside, and prefer an appeal from the order refusing to set aside. All these proceedings are very inexpensive and they cause delays which are as vexatious as they are lengthy.

In this case, we are not satisfied that the guardian has betrayed the interests of the minors. She does not allege this against herself, nor is it apparent, We agree with the learned Subordinate Judge that she was not prevented by any sufficient cause from appearing, and on the facts of this case we hold that her failure to appear did not constitute a sufficient cause for the failure of the minor defendants to appear.

This appeal is accordingly dismissed with costs.

S. V. V. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE K. S. MENON.

Kajuluri Viranna *alias* Bulli Veeranna and others .. *Petitioners* (Defendants)*

v.

Tillapudi Venkayya and others .. *Respondents (Plaintiffs and Defendants).*

Viranna *v.* Venkayya.

Madras Hereditary Village Offices Act (III of 1895), Ss. 13 and 21—Suit by a person actually holding the office for emoluments—Jurisdiction—If maintainable by Revenue Courts.

It is not only the person who is *entitled to hold* the office or to enjoy the emoluments that is hit at by S. 13 of the Madras Hereditary Village Offices Act (III of 1895) but also a person actually holding the office. Therefore a suit to recover possession of certain lands as *emoluments* attached to the potter service in the village, by a person who is *actually holding* the office, on the ground that he is entitled to hold the office and to enjoy the emoluments attached to it, comes within S. 13 of the Act and is excluded from the jurisdiction of Civil Courts by reason of the provisions of S. 21. The observations contra in *Ramamurthy* v. *Gajapathi Raju*, (1932) 64 M.L.J. 361: I.L.R. 56 Mad. 366, are *obiter*, as the suit there was, not one to recover the emoluments of the office but to *eject* the persons who were alleged to have trespassed on inam land which formed part of the emoluments of the office.

Petition praying that in the circumstances stated in the grounds filed therewith and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling

*C. M. P. No. 155 of 1936. 2nd October, 1936.

Viranna *v.* Venkayya.

for the records in Summary Suit No. 5 of 1934 on the file of the Court of the Deputy Collector of Cocanada and in Summary Appeal No. 22 of 1935 on the file of the Court of the District Collector of East Godavari at Cocanada and to quash all proceedings connected with them and pass such orders that this Court may deem fit.

V. Suryanarayana for Petitioners.

P. Somasundaram for 1st Respondent.

The Court made the following

ORDER.—This is an application for the issue of a writ of *certiorari* to call for the records in S. S. No. 5 of 1934 on the file of the Deputy Collector of Cocanada and in the appeal therefrom, Summary Appeal No. 22 of 1935 on the file of the District Collector of East Godavari and to quash the decisions therein.

The suit was to recover possession of the lands from defendants 7 to 18 on the ground that they were emoluments attached to the potter service in the village of Velangi and that the plaintiff was entitled to perform that service and has been performing it from 1932. Defendants 7 to 18 denied the truth of the genealogy set up in the plaint and contended that the plaintiff was not entitled either to perform the service or to the possession of the lands in question, and that they have been in possession for a long time. The trial Court found that the relationship set up by the plaintiff was true, that the suit was not barred by limitation or adverse possession, but dismissed the suit chiefly on the ground that the relinquishment by defendants 1 to 4 in favour of the plaintiff was not proved and that the plaintiff had not been appointed in their place. In appeal, that decree was reversed and a decree was given for the plaintiff as sued for.

The contention of the learned Advocate for the petitioners before this Court is that the Revenue Courts had no jurisdiction to entertain this suit. The only question therefore for decision is whether the Courts below had jurisdiction to entertain the suit. The allegations in the plaint make it clear that the lands, possession of which is sued for, are the emoluments of the potter service in the village concerned and that the plaintiff was suing in his capacity as the person, who was entitled to that office on the death of his father and after re-

linquishment by his brothers, defendants 1 to 4, and who has been regularly performing the potter service in that village from 2nd December, 1933. S. 13 (1) of the Madras Hereditary Village Offices Act (III of 1895) is as follows:—

" Any person may sue before the Collector for any of the village offices specified in S. 3 or for recovery of the emoluments of any such office, on the ground that he is entitled under sub-S. (2) or (3) of S. 10 of the Madras Proprietary Estates' Village Service Act, 1894, or under sub-S. (2) or (3) of S. 10 or sub-S. (2) or (3) of S. 11 or S. 12 of this Act as the case may be, to hold such office and enjoy such emoluments"

And S. 21 enacts:

" No Civil Court shall have authority to take into consideration or decide any claim to succeed to any of the offices specified in S. 3 or any question as to the rate or amount of the emoluments of any such office or except as provided in proviso (ii) to sub-S. (1) of S. 13, any claim to recover the emoluments of any such office."

It is not contended that this case comes within the proviso (*ii*) to sub-S. (1) of S. 13. What is argued is that it is only a person who is entitled to hold such office or to enjoy such emoluments and not a person who is actually holding the office who is entitled to sue before the Collector. In other words, the contention is that if the person who is actually holding the office sues for the emoluments of that office, he must sue in a Civil Court, and the only authority cited in support of that proposition is the case of *Ramamurthy* v. *Gajapathi Raju*[1]. In that case, no doubt Waller, J., observed (page 371):

" I am unable to see how the language of the section (13) can apply to a suit by an actual holder of an office to recover the emoluments thereof. Such a person comes into Court as the holder of the office and not as a person claiming to be entitled to hold it".

And the learned Judge proceeded to support it by the language of the second proviso to sub-S. (1) of S. 13. But it has to be observed that that suit was not one to recover the emoluments of an office. The learned Judge himself begins that portion of the judgment by saying:

" The suit is not one to recover the emoluments of an office, but to eject persons who are alleged to have trespassed on some inam land, which forms part of the emoluments of the office".

The observations are therefore more or less *obiter*. Again the statement "apart from that, I find great difficulty in following the decisions which have laid down that S. 21 of the Act takes suits by holders of offices for recovery of their emoluments out of the jurisdiction of the ordinary Courts"

---

1. (1932) 64 M.L.J. 361: I.L.R. 56 Mad. 366.

Viranna *v.* Venkayya.

shows that the decision therein runs counter to the trend of the earlier decisions of this Court. Pandalai, J. who was the other member of the Bench simply observed:

"I agree with my learned brother that the suit is not barred by S. 13 or 21 thereof".

The earlier decisions of this Court are clearly in favour of the view that suits by persons who are actually holding an office, for the recovery of emoluments attached thereto on the ground that they are entitled to hold the office or to enjoy such emoluments come within S. 13 and are excluded from the jurisdiction of Civil Courts by reason of the provisions of S. 21. In *Kesiram Narasimhulu* v. *Narasimhulu Patnaidu*[1] that view was upheld by three learned Judges of this Court. In that case, the suit was by a person, who was actually a karnam at the time, for the recovery of the land which was inam attached to the office, and Miller, J., observed:

"He can therefore only succeed by showing (1) that he is the karnam of the village entitled as such to enjoy the emoluments and (ii) that the land for which he sues is the emolument of his office. These must be the grounds of his suit and these are the grounds of suit which give him his right of action before the Collector under S. 13 (1)".

In the case of *Devineni Pattayya* v. *Kandukuri Kotiah*[2] the allegation was that the plaintiff and his ancestors had been enjoying, as of right, the carpenter and blacksmith inam and had been rendering service in connection therewith and that when the plaintiff demanded defendants 1 to 4 and 7 to 9 to deliver over possession of the land they ignored his right and intimated to him that defendants 7 to 13 had an independent right to the property. It was held by a Division Bench of this Court (Spencer and Phillips, JJ.) that the case was one excluded from the jurisdiction of the Civil Court by S. 21. Their Lordships observed:

"We are of opinion that in all cases where it is necessary for the plaintiff to allege for the maintenance of his suit, that the land in suit is an emolument of a service inam, the jurisdiction will remain with the Collector under S. 13 of the Act. This is a principle laid down in the Full Bench Division in *Kesiram Narasimhulu* v. *Narasimhulu Patnaidu*[1]".

Again, in the case of *Kandappa Achari* v. *Singara Chari*[3] another Division Bench of this Court held:

"Therefore all suits for the emoluments of an office on the ground that the plaintiff is holding the office must primarily be brought in the Revenue

1. (1906) 16 M. L. J. 514: I.L.R. 30 Mad. 126 (F.B.).
2. (1916) 5 L.W. 151.
3. (1926) 25 L.W. 299.

Court. The Civil Court has jurisdiction only in one case viz., where one of the issues is whether the emoluments are land or an assignment of revenue, and even that issue has to be decided first by the Revenue Court, and only when the relief which the Revenue Court can grant is exhausted. . . . . can he sue in the Civil Court for the recovery of the land".

In the last case, it was distinctly stated that even though the plaintiff was holding an office, the suit for the recovery of the emolument has to be brought in the Revenue Court. It may also be observed that there is nothing in S. 13 (1) itself which compels one to hold that suits by persons actually holding the office referred to therein for recovering the emoluments of that office do not come within the wording of that section. Having regard to the uniform course of decisions in this Court it must be held that the lower Courts had jurisdiction to deal with this suit. No case is therefore made out for the issue of a writ of certiorari.

The petition is therefore dismissed with costs. Advocates' Fee Rs. 75.

S. V. V. — *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VARADACHARIAR AND MR. JUSTICE BURN.

Desu Reddiar and another .. *Appellants* (Defendants 4 and 7)*

v.

Srinivasa Reddi (minor) by next friend Subba Reddiar and others .. *Respondents (Plaintiff and Defendants 1, 2, 3, 5, 6 and 8).*

Desu Reddiar
v.
Srinivasa Reddi.

Hindu Law—Suit by the presumptive reversioner questioning alienations by the widow—Remoter reversioners added as parties—If proper—Plea that plaintiff is not the reversioner, on the ground that the last male owner had a posthumous son—Plea attacking plaintiff's status—If joinder proper—Decree embodying declaration against birth of posthumous son—Validity of—Civil Procedure Code ((V of 1908), O. 1, r. 4—Specific Relief Act (I of 1877), S. 42.

One Bapu Reddi died in 1922 leaving behind two widows *A* and *N* and a daughter *B* by *A*. Shortly after his death, the widows divided the properties between themselves. *N* died in 1930. In 1926 *B* adopted the plaintiff *S*. *N* was putting forward an absolute right over the properties that she had obtained in the division with *A* and she executed in 1926 a mortgage in favour of the eighth defendant and in 1928 a registered will bequeathing in favour

* Appeal No. 43 of 1934. 17th December, 1935.

Desu Reddiar v. Srinivasa Reddi.

of the first defendant, her brother, all those properties. After *N's* death the plaintiff filed a suit for a declaration that the will in favour of the first defendant and the mortgage in favour of the eighth defendant were not binding on the plaintiff as reversioner and impleaded as parties, defendants 4 to 7, who were *gnatis* of Bapu Reddi and would inherit his estate if *B* should die sonless. They were setting up that a few days after Bapu Reddi's death, he got a posthumous son who died a few hours after birth and that plaintiff was not therefore the nearest reversioner and also objected to their being added as defendants. It was found the Bapu Reddi left no son and that plaintiff was the nearest reversioner. As the plaintiff had compromised with the first and eighth defendants, a decree was passed in terms thereof as against them but as against defendants 4 to 7 the decree declared that " the birth and the death of a posthumous son to Bapu Reddi is not true and that the plaintiff is the presumptive reversioner to the estate of Bapu Reddi".

Held, that the suit being one by the plaintiff, as presumptive reversioner, for a declaration that the mortgage deed and the will by *N* should not affect the interest of the reversioners as a class and not one in respect of the individual or personal title of the plaintiff, the suit was maintainable. In dealing with declaratory suits, stress is not to be laid so much on the question of their maintainability, as on that of the propriety and utility of granting relief by way of declaration.

Held further, that if the defendants 4 to 7 had contented themselves with the objection to their joinder in the suit, the Court might have removed them from the record as unnecessary parties; but when they also set up a positive plea that they had become the owners of the suit property on *N's* death and attacked the plaintiff's status as presumptive reversioner, the Court had anyhow to determine the issue as the plaintiff had to establish his status as a reversioner to entitle him to relief as against the other defendants. Defendants 4 to 7 are therefore proper parties as it is advantageous to try that issue in their presence.

Greeman Singh v. *Wahari Lall Singh*, (1881) I.L.R. 8 Cal. 12, dissented from.

Saudager Singh v. *Pardip Narayan Singh*, (1917) 34 M.L.J. 67 : L.R. 45 I.A. 21 : I.L.R. 45 Cal. 510 (P.C.), followed.

Janaki Ammal v. *Narayanasami Aiyar*, (1916) 31 M.L.J. 77 : L.R. 43 I.A 207 : I.L.R. 39 Mad. 634 (P.C.) and *Sheoparsan Singh* v. *Ramnandan Prasad Singh*. (1916) 31 M.L.J. 77 ; L.R. 43 I.A. 91 : I.L.R. 43 Cal. 694, distinguished.

Appeal against the decree of the Court of the Subordinate Judge of Cuddalore in O. S. No. 40 of 1933, (O. S. No. 25 of 1930 on the file of the District Court of South Arcot).

T. M. Krishnaswami Aiyar and *A. Balasubramania Aiyar* for Appellants.

M. Patanjali Sastri and *K.R.R. Sastri* for 1st Respondent.

The judgment of the Court was delivered by

Varadachariar, J.

Varadachariar, J.—This is an appeal by defendants 4 and 7 and the principal contention urged before us on their behalf is that defendants 4 to 7 should not have been impleaded in this suit nor any declaration made to their prejudice. The question arises under the following circumstances.

One Bapu Reddi who admittedly owned most of the suit properties died on 28th July, 1922, leaving him surviving two widows Ammalu Ammal and Narasammal and a daughter by the former named Balambal. The two widows seem to have divided the property between themselves a few months after Bapu Reddi's death and Narasammal died in May, 1930. Ammalu Ammal and Balambal are defendants 2 and 3 in this suit.

Defendants 4 to 7 are gnatis who would inherit the estate of Bapu Reddi after Balambal, should she happen to die sonless, but in September, 1926, Balambal adopted the plaintiff and this event practically defeated the chances of defendants 4 to 7 succeeding to the estate. The plaint suggests that defendants 4 to 7 have accordingly been putting it forward that Bapu Reddi was not the last male holder and that a posthumous son was born to him on 31st July, 1922, and died a few hours after birth. If this is true, it might exclude the second and third defendants as also the plaintiff from succession and let in defendants 4 to 7 as persons entitled to possession immediately on Narasammal's death. This version had been put forward by the present fourth defendant in a written statement (Ex. V) filed by him on 12th March, 1927, in O. S. No. 73 of 1927 on the file of the Tirukoilur Munsif's Court.

Narasammal herself was putting forward a claim of absolute right to the properties which she took in the division between herself and her co-widow and she based that claim on a will alleged to have been left by Bapu Reddi. She executed a mortgage of some of these properties in favour of the eighth defendant, a relation of hers on 12th August, 1926, and on 25th July, 1928, she executed a registered will devising to her brother, the first defendant, all the properties that she had obtained in the division.

This suit was filed by the plaintiff on 15th August, 1930, asking in the first instance for a declaration that the will in favour of the first defendant and the mortgage in favour of the eighth defendant are not binding on the plaintiff as reversioner. Defendants 4 to 7 were impleaded on the strength of a general allegation in paragraph 10 of the plaint that they were the junior paternal uncles' sons of the deceased and are proper and necessary parties to this suit. No reference was then made to the claim put forward on behalf of defendants 4

Desu Reddiar v. Srinivasa Reddi.

Varadachariar, J.

to 7 that Bapu Reddi was not the last male holder, and that they themselves were entitled to succeed to the estate on Narasammal's death.

In the written statement filed by defendants 4, 5 and 7 it was alleged in para 4 that on Narasammal's death defendants 4 to 7 had become heirs, and the plaintiffs had no cause of action to sustain the suit. Reference was made in para 5 to Bapu Reddi's son being the last male owner. In para 10, it was also averred:—

"To the suit as conceived these defendants are unnecessary parties. They are not even proper parties. The plaintiff's suit is designed to shut out the title of defendants 4 to 7 though it is ostensibly for getting a declaration in plaintiff's favour. . . . . This suit is caused to be filed by a remote reversioner without sufficient reasons. The suit is thus liable to be dismissed".

As regards the will and the mortgage relied on by defendants 1 and 8, defendants 4 to 7 supported the plaintiff in the contention that the transactions are not binding on the estate. In para 5, the fourth defendant set up his own title to some of the suit properties.

By an amendment of the plaint the D-schedule properties were brought into the suit, plaintiff claiming that they too belonged to Bapu Reddi's estate, while the fourth defendant claimed independent title to them and also pleaded adverse possession. By a further amendment made on 31st August, 1933, without any objection from the defendants, plaintiff was allowed to add para 10 (*a*) to the plaint, referring to the version of defendants 4 to 7 that Bapu Reddi's alleged posthumous son was the last male owner and the defendants 4 to 7 had therefore become entitled to the possession of the estate on Narasammal's death. The prayer was also amended by adding a declaration that Bapu Reddi was the last male holder of the suit properties, that no posthumous son was born to him, and that the plaintiff is the nearest male reversioner to the estate.

The learned Subordinate Judge has found that no posthumous son was born to Bapu Reddi, that defendants 4 to 7 are not therefore entitled to succeed to the estate, and that the plaintiff is the presumptive reversioner entitled to succeed to the estate after the death of defendants 2 and 3. The dispute as between the plaintiff and defendants 1 and 8 was compromised under an arrangement whereby part of Narasammal's properties was retained by these defendants and the other part

Desu Reddiar v. Srinivasa Reddi.

Varadachariar, J.

was given up to the plaintiff. The decree of the lower Court embodied this compromise and as between plaintiff and 4 to 7 defendants it declared that

> "the birth and the death of a posthumous son to Bapu Reddi is not true and that the plaintiff is the presumptive reversioner to the estate of Bapu Reddi".

Founding himself on the observations of the Judicial Committee in *Kathama Nachiar* v. *Dorasinga Tevar*[1] and *Sheoparsan Singh* v. *Ramnandan Prasad Singh*[2] Mr. Krishnaswami Iyer contended that the kind of declaratory suit permitted to a Hindu reversioner is only of a very limited scope, intended to call into question transactions improperly entered into by the widow, that the question in such suits is solely between the reversioner and the widow and that the reversioner cannot by bringing such a suit get as between him and a third party an adjudication of title which he could not get without it. In dealing with this contention, we must repeat, what has frequently been pointed out before, that observations regarding the scope or maintainability of declaratory suits contained in Judgments pronounced before 1877 should not be taken literally after the enactment of S. 42 of the Specific Relief Act. It must also be remembered that even S. 42 of the Specific Relief Act has been declared not to be exhaustive of the circumstances in which a person may ask for declaratory relief. The illustrations appended to that section no doubt refer to certain well-known classes of suits; but there is no justification for limiting the scope of the section by reference to the illustrations. An examination of the more recent pronouncement of the Judicial Committee and of the Indian High Courts will show that in dealing with declaratory suits, the Courts have in recent years laid stress not so much on the question of their maintainability as on that of the propriety and utility of granting relief by way of declaration. (Cf. *Bobba Padmanabhudu* v. *Bobba Buchamma*[3], *Surayya* v. *Annapurnamma*[4], and *Muthukumarasami Mudaliar* v. *Harinarayana Mudaliar*[5]).

In dealing with suits by reversioners, a distinction has been drawn between relief in respect of the individual or personal

---

1. (1875) L.R. 2 I.A. 169 (P.C.).
2. (1916) 31 M.L.J. 77 : L.R. 43 I.A. 91 : I.L.R. 43 Cal. 694.
3. (1918) 35 M.L.J. 144.
4. (1919) I.L.R. 42 Mad. 699.
5. (1927) 53 M.L.J. 601.

Desu Reddiar v. Srinivasa Reddi.

Varadachariar, J.

title of the particular plaintiff and relief claimed for the benefit of the body of reversioners represented by the presumptive reversioner. Relief of the former kind has generally been refused on the ground that an anticipatory declaration of the kind may be rendered valueless by future events; but relief of the latter kind is not open to the same objection, especially after the recognition of the representative character of a reversioner's suit and of the consequent applicability of the rule of *res judicata* even in favour of or as against the actual reversioner, who might not have been a party to the presumptive reversioner's suit. If this distinction is borne in mind, there will be little difficulty in reconciling the apparent conflict of cases or in deciding which line of authority governs the present case.

In *Janaki Ammal* v. *Narayanasami Aiyer*[1], there was, on the findings, nothing but the plaintiff's individual right that could be declared in his favour. In *Sheoparsan Singh* v. *Ramnandan Prasad Singh*[2], there was no reversionary interest at all to furnish the basis for a suit because a Probate Court had declared that the last male owner had left a will. The other observations in the judgment must be understood as only warning the courts against the possible abuse of the provisions relating to declaratory relief. On the other hand, it will be noticed that in *Saudagar Singh* v. *Pardip Narayan Singh*[3] the suit was only *in form* directed against an act of the widow. The substantial question decided in the case was whether the propositus was related by full blood or only by half blood to the plaintiff's ancestor; on the answer to this question depended the determination of the issue, whether the contesting defendant alone was the reversioner or the plaintiffs also were reversioners. Their Lordships saw no objection to the *real* question in dispute between the parties being adjudicated on in that litigation; they say

"that must always be the case....because it is only in virtue of the persons claiming the declaration being reversionary heirs, and therefore presumptively entitled, that the declaration is made."

The present case is very similar. The plaintiff undoubtedly had a cause of action to sue for a declaration that the mortgage deed and the will executed by Narasammal should not affect the interests of the reversioners; The fact that the

1. (1916) 31 M.L.J. 225: L.R. 43 I.A. 207: I.L.R. 39 Mad. 634 (P.C.).
2. (1916) 31 M.L.J. 77: L.R. 43 I.A. 91: I.L.R. 43 Cal. 694 (P.C.).
3. (1917) 34 M.L.J. 67: L.R. 45 I.A. 21: I.L.R. 45 Cal. 510 (P.C.).

plaintiff subsequently settled the dispute with the first and eighth defendants does not seem to us to justify the suggestion of the appellants that that portion of the suit was a sham fight merely intended to give the plaintiff a semblance of a cause of action. No such suggestion was made in the written statement. Narasammal left a *registered* will and she had put forward a claim to an *absolute* estate as early as 1927. The suit was therefore rightly laid. In such a suit the plaintiff could always be called upon to establish his status as a reversioner and the defendants could set up the title of another claimant by way of *jus tertii*. An issue relating to the plaintiff's status is therefore a proper and indeed a necessary issue in such cases. The question is whether such an issue should have been tried only as between the plaintiff and defendants 1, 2, 3 and 8 or could the defendants 4 to 7 whose title is the alternative title, have also been impleaded in the suit. If in the first instance these defendants had contented themselves with the objection to their inclusion in the suit, the Court might have removed them from the record; but when they set up a positive plea that they had become owners of the suit property on Narasammal's death, the Court could not reasonably evade the issue as to plaintiff's status as a reversioner, and there can be little doubt as to the advantage of trying it in the presence of defendants 4 to 7. The joinder of a prayer for relief against them may be open to possible objection on the ground of misjoinder; but the terms of O. 1, r. 4, Civil Procedure Code are now so wide that there will be little substance in the objection to the joinder. Hence it is that the appellants take the objection that plaintiff has no right to claim any relief against the defendants 4 to 7.

It may be conceded that the decision in *Greeman Singh* v. *Wahari Lall Singh*[1], supports the appellant's contention but the wide language employed by Mitter, J., in that case has been dissented from in *Gangayya* v. *Mahalakshmi*[2] and *Manmatha Nath Biswas* v. *Rohilli Moni Dasi*[3]. The distinction relevant to the application of S. 42 of the Specific Relief Act is, not that between vested and contingent rights (as suggested by Mitter, J.), but that between a suit for a declaration of the reversionary title of the plaintiff and a suit for the protection and preserva-

1. (1881) I.L.R. 8 Cal. 12. 2. (1886) I.L.R. 10 Mad. 90.
3. (1904) I.L.R. 27 All. 406.

Desu Reddiar v. Srinivasa Reddi.

Varadachariar, J.

tion of the reversionary estate; (See *Balumkund Lal* v. *Musammat Sohano Kueri*[1].) It was pointed out in *Puttanna* alias *Keshava Bhatta* v. *Ramakrishna Sastri*[2] that such protection is not limited to protection against acts of the widow and the same principle was applied in *Balmukund Lal* v. *Musammat Sohano Kueri*[1]. In *Puttanna* alias *Keshava Bhatta* v. *Ramakrishna Sastri*[2] Subramanya Iyer and Benson, JJ., held that a presumptive reversioner could sue for a declaration against devisees claiming under an alleged will of the last male owner. In *Balmukund Lal* v. *Musammat Sohano Kueri*[1] the learned Judges held that in a presumptive reversioner's suit the Court could legitimately decide the question whether the propositus died divided or undivided from his coparceners. They observed: 'although the Court ought not to declare that the plaintiffs will be entitled to succeed . . . . . . the Court may properly declare that Nandkumar was separate from his nephews and that he left an estate capable of being inherited by his heirs'. This is substantially what has been done in the present case by the learned subordinate judge. In *Ram Pershad Chowdry* v. *Jokhoo Roy*[3] the question in dispute between the parties was very similar to that raised in the present case *viz.*, as to who should be deemed to be the last holder, though there was the added feature in that case that the limited owner put the real claimant in possession and supported his claim. The decision in *Rama Rao* v. *The Raja of Pittapur*[4] dealt with the case on the footing that the only declaration asked for was 'that the plaintiffs and not the Raja are the next reversioners of the deceased'. Even in such a case Sir John Wallis based his decision only on the ground of the futility of the declaration and on the rule of *practice* against making such a declaration. Seshagiri Aiyar, J., emphasised the distinction between the plaintiffs' individual 'right or legal character in his own right' and his right as representing the entire body of reversioners'. In *Surayya* v. *Subbamma*[5] Napier. J., (with whose judgment on this point Sadasiva Aiyar J., concurred) expanded the view that a presumptive reversioner, when looked at in the character of a

1. (1928) I.L.R. 8 Pat. 153 at 159.
2. (1906) 17 M.L.J. 374: I.L.R. 30 Mad. 195.
3. (1884) I.L.R. 10 Cal. 1003.
4. (1918) 36 M.L.J. 169: I.L.R. 42 Mad. 219.
5. (1919) 37 M.L.J. 405: I.L.R. 43 Mad. 4.

representative of the body of reversioners, has a 'legal character' within the meaning of S. 42 of the Specific Relief Act; and if that character is disputed or denied by another, there is no reason why the case should not be held to fall within the section. The decision in *Latchamma* v. *Appanna*[1] is the logical result of the application of the above principle and the true *ratio* of the decision should not be allowed to be obscured by the fact that in that case the dispute as to the plaintiffs' status was raised by the limited owner herself. In the words of Phillips, J., the suit will be maintainable whenever it is one 'to establish the identity of the last male holder and thereby to ascertain in which family are to be found the general body of reversioners.'

Desu Reddiar v. Srinivasa Reddi.

Varadachariar, J.

On the question of fact as to whether a posthumous son was born to Bapu Reddi, we see no reason to differ from the conclusion of the learned Subordinate Judge. Even if the matter rested only on conflicting oral evidence, we should be slow to differ from the learned Subordinate Judge's appreciation of the evidence. In this case the documentary evidence and the probabilities are decidedly in favour of the plaintiff's version. It would appear from Ex. D that within a few days of Bapu Reddi's death it was stated that his younger wife was then only *four months* pregnant. It is impossible to accept appellant's present story in the face of this statement.

As to the form of the decree, we have considered whether it is necessary or worth while to retain in the decree itself a reference to the question of the alleged birth of a posthumous son to Bapu Reddi. It is true as pointed out in *Veerammal* v. *Kamu Ammal*[2] that it is not usual to embody a decision on such points in the decree. But in the particular circumstances of this case it seems to us better on the whole to leave the decree as it is. The appeal fails and is dismissed with costs of the plaintiff, first respondent.

S. V. V. *Appeal dismissed.*

---

1. (1921) 41 M.L.J. 386. 2. (1915) 2 L.W. 850.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VARADACHARIAR AND MR. JUSTICE MOCKETT.

The Taluk Board of Koilpatti through its President Subba Naicker and others .. *Appellants** (*Plaintiff and Nil*)

v.

Senthattikalai Pandia Chinnathambiar (deceased) Zamindar of Sivagiri and others .. *Respondents* (*Defendant and Nil*).

Taluq Board of Koilpatti *v.* Zamindar of Sivagiri.

Contract—Zamindar promising to pay Taluq Board annual subscription for maintenance of a Hospital, provided one was established within his Zamindary—Establishment of Hospital accordingly—Payment of annual subscription stopped by successor of Zamindar—Contract whether in its nature a continuing offer—Contract whether can bind successors—Whether charge created on the estate.

A Taluq Board obtained a registered contract in 1895 from a Zamindar by which he on behalf of himself, his heirs and successors bound himself "to pay the Board an annual contribution of Rs. 500 on or before the 30th day of September every year in consideration of the establishment and maintenance by the said Taluq Board of a dispensary in the Zamindari" and also "to pay the said Taluq Board Rs. 2,000 towards meeting the costs of construction of a building for the dispensary when the work shall be begun." A building was accordingly constructed and the Zamindar was paying the contribution of Rs. 500 till September, 1924. The defendant who had by this time come into possession of the Zamindari declined to make any further contribution on the ground that there was no need so long as the Taluq Board realised moneys from other sources. The lower Court held that on a true construction of the contract deed it only bound the then Zamindar and not his successors in estate and also that so much of the agreement as related to the annual contribution of Rs. 500 did not amount to a contract because there was no corresponding obligation on the part of the Board to continue to maintain the hospital for all time and that that portion of the document was only in the nature of a continuing offer which could be revoked and had been properly revoked by the defendant,

Held, (1) on a construction of the document that there was no doubt as to the intention of the parties to enter into the arrangement not merely on behalf of the then Zamindar but also on behalf of his heirs and successors in the estate;

(2) that it was not in the nature of a continuing offer from year to year but an enforceable contract by which the Taluq Board was entitled so long as it maintained the dispensary, to claim from the Zamindar the annual contribution.

Once a promise becomes consideration, it is not for the Court to examine the quantum or adequacy of the consideration except where the language of the document is ambiguous. A mere promise to supply goods to another on credit may not amount to consideration in law for a guarantee in respect of

* Appeal No. 60 of 1932. 26th February, 1936.

Taluq Board of Koilpatti *v.* Zamindar of Sivagiri.

past debts due by such other person. But if the merchant does in fact supply goods on the strength of the guarantee, the benefit of the guarantee may, if the language of the document is clear, attach not merely to goods supplied after the date of the guarantee but also to prior debts. If the proper construction of the document in this case is that in consideration of the Zamindar's promise the Board has fulfilled its promise at least to the extent of constructing the hospital there can no longer arise any question of absence of consideration for the Zamindar's promise.

Westhead v. *Sprosen*, (1861) 6 H. & N. 728: 158 E.R. 301; *Morrell* v. *Cowan*, (1887) 6 Ch.D. 173 and *Morrell* v. *Cowan*, (1878) 7 Ch.D. 151, referred to.

(3) That neither the language of the document nor the surrounding circumstances sufficed to import the creation of a charge on the Zamindari.

Rajah of Ramnad v. *Sundara Pandiyasami Thevar*, (1918) 36 M.L.J. 164: L.R. 46 I.A. 64: I.L.R. 42 Mad. 581 (P.C.) referred to and distinguished.

(4) If the obligation were to be held to rest merely on the covenant, it would be far fetched to rely upon the analogy of *Nibandha* in the Hindu Law to make the obligation valid and perpetually binding on all persons coming into possession of the Zamindari whether by inheritance or by survivorship or by alienation.

Hence an obligation of that kind resting only on a covenant could not be enforced against the Zamindari in the hands of persons who had succeeded to it by survivorship and those coming after them.

Appeal against the decree of the Court of the Subordinate Judge of Tinnevelly in O. S. No. 112 of 1929.

The Advocate-General (Sir A. Krishnaswami Aiyar) and *K. Subramaniam* for Appellants.

S. Srinivasa Aiyangar and *A. Swaminatha Aiyar* for Respondents.

The judgment of the Court was delivered by

Varadachariar, J.

Varadachariar, J.—The Taluq Board of Koilpatti sued the Sivagiri Zamindar for a declaration of rights and for recovery of money on foot of an agreement, Ex. A, executed on 6th June, 1895, by a former Zamindar of Sivagiri in favour of the Tinnevelly Taluq Board in whose territorial jurisdiction Sivagiri was then included.

The correspondence exhibited in the case established that the then Zamindar was keen upon having a Taluq Board Hospital established at Sivagiri, the headquarters of his Zamindari, but the Taluq Board was not prepared to do so unless the Zamindar agreed to make a contribution both towards the cost of construction and towards the expenses of its maintenance. The Zamindar having accepted this condition, the hospital was opened in September, 1894, in a building temporarily occupied for the purpose; but, before beginning the construction of a permanent building, the Board insisted on and obtained a registered document Ex. A from the Zamindar. By this docu-

Taluq Board of Koilpatti *v.* Zamindar of Sivagiri.

Varadachariar, J.

ument, the Zamindar *on behalf of himself, his heirs and successors* bound himself "to pay to the Board an annual contribution of Rs. 500 on or before the 30th day of September every year in consideration of the establishment and maintenance by the said Taluq Board of a dispensary at Sivagiri" and also "pay to the said Taluq Board Rs. 2,000 towards meeting the cost of construction of a building for the dispensary when the work shall be begun". A building was accordingly constructed by the Board, the Zamindar paid his contribution of Rs. 2,000 and he as well as his successors continued to pay the annual contribution of Rs. 500 till September, 1924. The defendant who had by this time come into possession of the Zamindari declined to make any further contribution on the ground that the Taluq Board was realising quite a large sum by way of cesses, and no longer stood in need of a contribution from him for the purpose of the hospital. Hence this suit.

The learned subordinate Judge has held that on a true construction of Ex. A, it only bound the then Zamindar and not his successors in the estate. He was also of opinion that so much of the agreement as related to the annual contribution of Rs. 500 did not amount to a *contract* because there was no corresponding obligation on the part of the Board to continue to maintain the hospital for all time: he held that this portion of Ex. A was only in the nature of a continuing *offer* which could be revoked and had been revoked by the defendant. Finally he held that the obligation, if any, imposed by Ex. A upon succeeding Zamindars could not be enforced as against the estate because of the provision of S. 4 of the Madras Impartible Estates Act (II of 1904) and he was of opinion that the present case did not fall, within the exceptions saved by S. 7. He accordingly dismissed the suit. Hence this appeal by the Taluq Board.

The first ground of the lower Court's decision may easily be disposed of. It is perhaps possible to criticise Ex. A as introducing the reference to "heirs and successors" in an appropriate place but reading Ex. A as a whole, we have no doubt that it was the intention of the parties to enter into the arrangement not merely on behalf of the then Zamindar but also on hehalf of his heirs and successors in the estate. Whether he could validly do so is another matter. We do not

pursue the point further, because Mr. Srinivasa Iyengar, who appeared for the respondent before us, did not attempt to support this ground of the lower Court's decision.

In dealing with the second point, we cannot agree, with the lower Court in splitting up Ex. A into two independent parts, one relating to the construction of the hospital, and the other relating to its maintenance. Not merely the substance of the thing but even the collocation of words in Ex. A suggests that the Taluq Board agreed to *establish* a hospital at Sivagiri only on condition of the Zamindars agreeing to contribute annually a part of the expenses of its maintenance. To say that there was one offer to contribute towards the costs of the construction and this was accepted by the Board and the whole matter terminated on the construction of the hospital, leaving the question of its maintenance to be governed by a *separate* offer and acceptance does not seem to us a reasonable construction of Ex. A. It is obvious that it was not worth while bringing a hospital into existence—the correspondence makes it clear that the Taluk Board would not have put itself to the trouble and expense of constructing a hospital at Sivagiri—without some definite arrangement for meeting the cost of its working expenses. The learned Judge's theory that for the expenses of each year there is a separate offer by the Zamindar of a contribution which must be deemed to be accepted by the Board by maintaining the hospital for that year seems to us wholly artificial and unnatural. It might as well be said that the offer is one from day to day or even hour to hour. We are not prepared to uphold the power of revocation claimed by the Zamindar on this basis.

The argument has also been put in a slightly different form, namely, that as there is no obligation on the part of the Taluq Board to maintain the hospital, there is no 'consideration' for the Zamindar's promise and there is accordingly no legal or enforceable contract. It may be conceded that where a promise by *A* is consideration for a promise by *B*, the former, so long as it remains executory, will not amount to consideration in the eye of the law unless it involves a legal obligation which *A* may be compelled to perform. In this connection some arguments were urged before us to show that the Taluq Board has not bound itself and could not bind itsel to maintain the hospital. We do not propose to enter upon a discussion of this question because for the purpose of this

Taluq Board of Koilpatti v. Zamindar of Sivagiri.

Varada-chariar, J.

argument we are prepared to assume that the Taluq Board was not compellable to continue the hospital at Sivagiri. Even where the promise on one side does not involve a legal obligation, there can be little doubt that its performance will constitute sufficient consideration, that is, as an *executed* consideration, for the promise on the other side.

A comparison of *Westheard* v. *Sprosen*[1], referred to in this connection with *Morrell* v. *Cowan*[2] and *Morrell* v. *Cowan*[3] will suffice to show that once the executed promise becomes the consideration, it is not for the Court to examine the quantum or adequacy of the consideration except where the language of the document is ambiguous. A mere promise to supply goods to another on credit where there is no obligation undertaken to do so may not amount to consideration in law for a guarantee in respect of *past* debts due by such other person. But if the merchant does in fact supply goods on the strength of the guarantee, the benefit of the guarantee may, if the language of the document is clear enough, attach not merely to the goods supplied *after* the date of the guarantee but also prior debts. If, as we have already held, the proper construction of Ex. A is that in consideration of the Zamindar's promise, the Board has fulfilled its promise at least to the extent of constructing the hospital there can no longer arise any question of *absence* of consideration for the Zamindar's promise. Mr. Srinivasa Iyengar asked whether, in this view, it would not follow that the Board could claim annual contribution from the Zamindar even if it should cease to maintain the hospital. We do not think it would. The very idea of a 'contribution' and the reference to 'maintenance' in Ex. A imply the continued maintenance of the hospital by the Board, but to reach this result it is not necessary to treat the matter as a question of 'consideration'. It may well be regarded as a 'condition' or limit of the obligation itself.

There remains the question whether the obligation imposed on himself and his successors by the then Zamindar under Ex. A is *binding* on the successors in title to the Zamindari of Sivagiri. Though the lower court has regarded the question as concluded by the provisions of the Madras Impartible

1. (1861) 6 H. & N. 728: 158 E.R. 301.
2. (1887) 6 Ch. D. 173.
3. (1878) 7 Ch.D. 151.

Taluq Board of Koilpatti *v.* Zamindar of Sivagiri.

Varadachariar, J.

Estates Act, it was realised in the course of the arguments before us that the point involved wider issues. It was agreed that if Ex. A could be construed as creating a charge on the zamindari, the answer to this question would be easy enough. The learned Advocate-General accordingly relied on the decision of the Judicial Committee in *Rajah of Ramnad* v. *Sundara Pandiyasami Thevar*[1], in support of his contention that Ex. A must be held to create a charge. Their Lordships do not go into the reasons for taking that view in that case, apparently because they were prepared to adopt the reasons given by Seshagiri Iyer, J., in the High Court (See *Rajah of Ramnad* v. *Sundara Pandiyaswamy Thevar*[2]. Giving the matter our best consideration, we are unable to hold that either the language of Ex. A or the surrounding circumstances suffice to import the creation of a charge on the Zamindari. Several of the reasons relied on by Seshagiri Iyer, J., in *Rajah of Ramnad* v. *Sundara Pandiyaswamy Thevar*[2], do not exist here. If the obligation is to be held to rest merely on covenant, it seems to us far fetched to rely upon the analogy of *nibandha* in the Hindu Law to make the obligation valid and perpetually binding on all persons coming into possession of the Zamindari, whether by inheritance or by survivorship or by alienation. We do not rest our conclusion on the provisions of the Madras Impartible Estates Act, because Mr. Srinivasa Iyengar admitted that if the obligation under Ex. A would not fall within the exception enacted in S. 7 of that Act, it would not also be covered by the prohibition enacted in S. 4. We do not think that we can describe the obligation as amounting to a 'debt' in the natural or usual sense of the term. It is not by any means analogous to the case of a present debt payable by instalments. On the ground that an obligation of this kind resting only on covenant cannot be enforced against the Zamindari in the hands of persons who have succeeded to it by survivorship and those coming after them, we affirm the decree of the lower Court and dismiss the appeal with costs.

Mockett, J.

Mockett, J.—I agree with my learned brother for the reason given by him that as between the Taluq Board and the Zamindar, there was an enforceable contract by which the Taluk Board was entitled, so long as it maintained the Dispen-

1. (1918) 36 M.L.J. 164: L.R. 46 I.A. 64: I.L.R. 42 Mad. 581 (P.C.).
2. (1914) 27 M.L.J. 694.

Taluq Board of Koilpatti *v.* Zamindar of Sivagiri.

Mockett, J.

sary, to claim from the Zamindar the sum of Rs. 500 annually. But the real question is, how far that contract binds the Zamindar's successors. The respondent has before us raised a contention which was not pleaded in the Court below and which is not mentioned in the grounds of appeal. It is argued that under Ex A, a charge is created on the Zamindari and reliance is placed on the decision of the Judicial Committee in *Rajah of Ramnad* v. *Sundara Pandiyasami Thevar*[1], a case in which the Board held that a charge was created on the estate of the Rajah of Ramnad. This argument was essential to the appellant's case as I do not understand that it was contended that it was possible for the Zamindar to bind his successors except by a charge on the estate. Whether an intention to create a charge exists, naturally depends upon the document in each case together with its surrounding circumstances, *Janardhan* v. *Anant*[2]. In this case the oral evidence for the plaintiff is in no way explanatory of the facts from which Ex. A emerged, being confined to proof of documents. But paragraph 4 of the plaint refers to Sivagiri as having a 'dense population' but no dispensary and paragraph 5 states that the Zamindar realised the urgent necessity for a medical dispensary there. Whether the Taluq Board realised this too is not stated but it is stated that the Board could not afford a dispensary. That is, they could not then afford it. It is of course the duty of the Board to provide such dispensaries especially in places with dense populations.

We are dependent almost entirely on the correspondence and other documents. Ex. A unquestionably purports to bind the Zamindar and his heirs and successors. But it is important to note that the dispensary is to be under the control of the Taluq Board and is open to any class of parties. There is therefore no question of the dispensary being for the treatment exclusively of the Zamindar's retainers. In *Rajah of Ramnad* v. *Sundara Pandiyasami Thevar*[1], the facts were that there was a claim to the Zamindari which was compromised on terms that one party gave up his claim and agreed to receive Rs. 700 a month in perpetuity from the other. So, in exchange for his claim, one party who was to receive a money payment from the other in the words of the compromise "from

1. (1918) 36 M.L.J. 164: L.R. 46 I.A. 64: I.L.R. 42 Mad. 581 (P.C.).
2. (1908) 32 Bom. 386.

Taluq Board of Koilpatti v. Zamindar of Sivagiri.

Mockett, J.

generation to generation". The English record of compromise reads thus:

"The plaintiff having thus completely relinquished all right and claim, the defendant and her heirs holding the Zamindari shall, from 1st November, 1860, pay to the plaintiff and his heirs a monthly allowance of Rs. 700".

Seshagiri Aiyar, J.. whose judgment met with the approval of the Board, held that the above constituted a charge. In this respect he differed from Sir John Wallis, O. C. J. His reasons were expressed as follows:

"It must also be borne in mind that Sivaswami claimed the whole Zamindari. and it is hardly conceivable that he would have been content to take a personal covenant for payment of the allowance when he had laid claim to the Zamindari itself. Further if no charge is intended to be created upon the Zamindari, it was hardly necessary in these two documents to use the expression 'the defendant and her heirs holding the Zamindari'. Moreover the grant was in the nature of one for maintenance and it is well understood that maintenance ordinarily comes out of an estate in the possession of the promisor".

The learned Judge goes on to hold that from the surrounding circumstances the party who gave up so large a claim intended to secure the maintenance by a charge. In an earlier case, also a decision of the Judicial Committee reported in *Narayana Anangà* v. *Madhava Deo*[1], their lordships took the view that in the settlement of a dispute between rival parties interested in an impartible Zamindari estate, the language of the document and the facts showed that the interests of the disputant were intended to be protected by a charge. It does not appear that the present case is analoguous to the above authorities. I do not think it was intended to lay down that in all circumstances where a Zamindar purported to contract to bind himself and his successors, it would follow that his successors were bound by a charge on the estate. So to hold would appear to put Zamindars in a different category to other persons. The Taluq Board had no claim on the Zamindari. In the cases cited the whole basis of the charge was to satisfy such a claim. I think this contract must be dealt with like any other contract. I do not think it can be gathered from the surrounding circumstances that a charge was ever intended to be created and in view of the late stage at which this contention has been raised, I am not in the least satisfied such a charge was created or has been proved. The plaintiffs can, if they think fit close the dispensary, thus restoring the *status quo*.

1. (1893) L.R. 20 I.A. 9: I.L.R. 16 Mad. 268 (P.C.),

Taluq Board of Koilpatti *v.* Zamindar of Sivagiri.

Herein is another marked difference between the position of a person who has given up all his rights in a Zamindari and the facts before us. I agree therefore that this appeal should be dismissed with costs.

K. C. *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of New Zealand.]

PRESENT: LORD ATKIN, LORD RUSSELL OF KILLOWEN, LORD MACMILLAN, LORD ALNESS AND SIR LYMAN POORE DUFF.

The Attorney-General of New Zealand .. *Appellant**

v.

The New Zealand Insurance Company, Limited. and others .. *Respondents.*

P.C.

Attorney General of New Zealand *v.* New Zealand Insurance Co., Ltd,

Will—Construction—Gift to "institutions, societies or objects established in or about Auckland for charitable, benevolent, educational or religious purposes"—If valid.

Where a testatrix by her will devised her residuary estate to trustees to apply it in making bequests "towards institutions, societies or objects established in or about Auckland . . . . for charitable benevolent, educational or religious purposes" at their discretion,

Held, that even assuming that only existing organisations are intended to be benefitted, and though the local area is also circumscribed, the bequest is invalid because of the indefiniteness in the expression 'benevolent'.

Spens K.C. and *J. Stamp* for Appellant.

R. F. Roxburgh K.C. and *G. O. Slade* for Trustees.

Gavin Simonds, K.C.Uthwath and *Lathan* for Respondents.

15th October, 1936. Their Lordships' judgment was delivered by

LORD MACMILLAN.—The late Mrs. Catherine Smith of Auckland in her will dated 23rd December, dealt with her residuary estate as follows:..

"As to the rest, residue and remainder of my real and personal property of whatsoever kind and wheresoever situate (including all money or property bequeathed or devised as aforesaid where such bequest or devise shall have lapsed) I direct my Trustee to apply the same in making other bequests towards institutions, societies or objects established in or about Auckland aforesaid for charitable, benevolent, educational or religious purposes and my Trustee may benefit such institutions, societies or objects and in such amounts or amount as it in its absolute discretion shall deem advisable."

The testatrix died on 12th August, 1933, and the net value of the residue of her estate was between £80,000 and £90,000. The sole question for determination is whether the

* P. C. Appeal No. 6 of 1936. 15th October, 1936.

P.C.

Attorney General of New Zealand v. New Zealand Insurance Co., Ltd.

residuary bequest above quoted is valid and effectual. Herdman, J., in the Supreme Court of New Zealand held that it was, but his decision was reversed by the Court of Appeal (Reed, J,, dissenting).

Their Lordships find themselves so fully in agreement with the views expressed by the learned Chief Justice and his colleagues in the majority in the Court of Appeal, and in particular by Johnston, J., in his brief but very lucid judgment, that it would be superfluous to repeat what has already been so well said.

The privilege of controlling by will the disposition of property after death is subject to the condition that such disposition must be made in favour of ascertained or ascertainable persons or objects. A testator is not permitted to delegate to others the disposition of his property, subject to this that he may confer upon his trustees a power of selection and apportionment among a definitely prescribed class of beneficiaries. In the case of charitable objects the law, by reason of the favour in which charity is held, has accepted such objects as constituting a sufficiently ascertained class notwithstanding its wide extent, and permits a testator to direct a fund to be distributed among such charities and in such proportions as his trustees may in their discretion decide. But in all other cases the requirement of definite precision is enforced in the definition of the individuals or classes to be benefited.

Now it is settled beyond dispute that a bequest by a testator in favour of benevolent objects to be selected by his trustees does not answer this requirement and is ineffectual because of its indefiniteness. In the present bequest the fatal word "benevolent" occurs on which so many testamentary dispositions have been shipwrecked, but it is urged that the bequest is salved by the fact that it is not in favour of benevolent purposes at large to be selected by the trustee but is in favour of institutions, societies or objects in or about Auckland for benevolent purposes. It is suggested that sufficient definiteness is imparted to the benevolent objects of the bequest by specifying that they are to be institutions, societies or objects, presumably in existence and ascertainable, and that these institutions, societies or objects are to be in or about Auckland, so that the trustee should have no difficulty in

P. C.

Attorney General of New Zealand v. New Zealand Insurance Co., Ltd.

determining the class of objects among which to select beneficiaries.

It is probably the case that the addition of a local qualification may in certain circumstances render sufficiently definite what would otherwise be too wide a class, but in the present instance the want of precision is inherent in the word "benevolent" itself. Consequently, however circumscribed the local area and assuming that only existing organisations are intended, it still remains that to predicate of an institution, society or object in or about Auckland that it must be "benevolent" is not to identify it with the requisite precision. That being so, it is unnecessary to discuss whether a further ambiguity lurks in the word "objects," or to comment on the peculiar form of the direction to the trustee to make bequests.

Their Lordships will therefore humbly advise His Majesty that this appeal be dismissed and the judgment of the Court of Appeal of New Zealand of 18th May, 1935, be affirmed. By arrangement between the parties no order with regard to costs is necessary.

Solicitors for Appellant: *McKrell, Maton, Godlee and Quincey.*

Solicitors for Trustees: *Baker and Nairne.*

Solicitors for Respondents: *Bartlett and Gluckstein.*

S. V. V.

S. P. K. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VARADACHARIAR AND MR. JUSTICE BURN.

V. K. R. N. S. M. Subramanian Chettiar .. *Appellant** (*Defendant*)

v.

V. K. R. N. P. S. S. M. Somasundaram Chettiar .. *Respondent* (*Plaintiff*).

Subramanian Chettiar v. Somasundaram Chettiar.

*Hindu Law—Adoption—Custom—Nattukottai Chetty families—Mother-in-law adopting when daughter-in-law is alive with sapinda's consent—Adoption Muri—Provision for daughter-in-law also adopting—No adoption by daughter-in-law—If adoption valid and adopted son entitled to succeed to properties of adoptive family—*Jus tertii*—When open—Plaintiff in joint possession with defendant—If plea available.*

On the death of *P*, an Illuppakudi Nattukottai Chetty, his widow *V* succeeded to his estate and first adopted *A* in 1916. The said *A* married one

*Appeal No. 272 of 1933. 8th January, 1936.

E, enjoyed *P's* estate and died in 1930 leaving behind his own widow *E* and the adoptive mother *V*. In 1931 the mother *V* again adopted *L*, an orphan aged 27 years, with the consent of the defendant *S*, who was *P's* father's divided brother's son. An adoption muri (Ex. A) was executed which recited that *L* had become the son of *P* and 'shall, as son, hold and enjoy' all *P's* properties. It was attested by defendant to signify his association in the act of adoption. Another document purporting to be panchayatdar's decision was also signed by the defendant and it provided that "within a period of 10 years from this day, the son that may be born to *L* (plaintiff) who is now adopted to *P* shall be got adopted to *E* the wife of *A* or a son from outside shall be adopted. The said adopted son of *E* and *P's* son *L* shall enjoy in equal halves all the properties". The evidence did not show if *E* was a party to these documents or consented to *L's* adoption but ever since the adoption *L* has been living with *V* and *E* in a portion of the family house, the other portion being in *S's* occupation. At *L's* marriage also, *S* officiated as his nearest agnatic kinsman. In a suit by *L* for a division of the properties which remained in common between *P's* branch and *S's* branch, *S* disputed *L's* adoption and pleaded *jus tertii* setting up title in *E*.

Subramanian Chettiar v. Somasundaram Chettiar.

Held, that the practice in this community of taking orphan boys in adoption was established by the evidence in the case. Though the observation in *Bhooban Moyee Debia* v. *Ram Kishore Acharj Chowdhury*, (1865) 10 M.I.A. 279 at 310 suggested that it is against public policy to permit an adoption by a mother-in-law after the estate had vested in the daughter-in-law in which case such an adoption could not be validated by custom, recent cases have not reaffirmed that ground but have based the termination of the mother's power to adopt on religious grounds and hence a custom recognising such an adoption may be valid.

It is doubtful if it would be proper to attach to an adoption which *ex-hypothesi* is opposed to the general Hindu Law but is only sought to be validated by custom all the legal consequences which the general law would attach to a normal valid Dattaka adoption.

Under the general law itself, an adoption like that of the plaintiff (assuming it to be valid) will not have the effect of divesting the daughter-in-law of the estate which she had taken as her husband's heir. Recent decisions in *Mansingh* v. *Sanatan Singh*, (1933) I.L.R. 12 Pat. 642 and *Vijayasinghji* v. *Shivasangji*, (1932) I.L.R. 59 Bom. 360, have to some extent dissociated the question of the termination of a widow's power to adopt from that relating to the vesting and divesting of the estate. But it does not follow that the conclusion in favour of the continuance of the widow's power of adoption will necessarily justify the conclusion that the person so adopted will, regardless of other considerations, also divest everybody who might in the interval have taken the estate which once belonged to the adoptive father. *Mansingh* v. *Sanatan Singh*, (1933) I.L.R. 12 Pat. 642 and *Vijayasinghji* v. *Shivasangji*, (1935) I.L.R. 59 Bom. 360, cannot be applied to a case where the person to be divested is the nearest heir to the last full owner, assuming that by a fiction the new adopted son could be taken to have become a member of *A's* family, at the moment of *A's* death. The fiction cannot be carried here earlier than *A's* death, because the presence of *A* is itself a bar to the adoption of *L* by *V*.

Ex. A cannot be construed so as to mean that plaintiff will acquire only such property as can be regarded as *P's* at the date of plaintiff's adoption and not of the property of *A*. It was intended to mean *P's* estate in *A's* hands.

As *E* is not a party to this suit and is not even a witness here, the Court held that as against the defendant only, the evidence is sufficient to establish that plaintiff is entitled to the half share which *P* and *A* were entitled to in the common properties of the two branches.

Subramanian Chettiar *v.* Somasundaram Chettiar.

The plea of *justertii* may be available in an action of ejectment where the plaintiff is not in possession but where the plaintiff is in legal possession with the defendant, having been so admitted to possession by the defendant himself on the assumption that the plaintiff was entitled thereto, and the person in whose favour the title is set up is living with the plaintiff and has not disputed the plaint ff's title, it is not open to the defendant to treat plaintiff as a trespasser.

Appeal against the decree of the Court of the Subordinate Judge of Devakottah in Original Suit No. 27 of 1932.

T. M. Krishnaswami Aiyar, V. Rajagopala Aiyar and *T. V. Ramiah* for Appellant.

M. Patanjali Sastri and *T. K. Sundararaman* for Respondent.

The judgment of the Court was delivered by

Varadachariar, J.

Varadachariar, J.—This appeal raises some questions of law and custom relating to adoption in the Nattukottai Chetti community. They arise in the following circumstances:—

There were two brothers Pichappa and Somasundara. The defendant is Somasundara's adopted son; Pichappa left a son named Pichaikutti. The two branches had become divided, but, continued to hold some immoveable properties in common, according to the plaintiff's case.

Pichaikutti died in 1911 leaving a widow Valliammai who, in 1916, adopted one Arunachala. Arunachala enjoyed Pichaikutti's properties whatever they were, married one Egamai and died in June, 1930, leaving Egamai him surviving. On 7th June, 1931, Valliammai adopted the plaintiff who was admittedly, an orphan, aged about 27 years at the time. As usual amongst Chettis, a Muri (Ex. A) was executed at the time of the adoption and it is attested by the defendant, a circumstance which according to Chetti usage not merely signifies proof of the execution of the document (as in the ordinary acceptation of the word 'attested') but associates the defendant with the act of adoption as the nearest pangali in the adoptive family. Ex. A recited that the plaintiff had become the son of Pichaikutti and "shall, as son, hold and enjoy" all Pichaikutti's properties. On the same day, the defendant signed Ex. DD (though it is dated the previous day) which purports to be a decision of certain panchayatdars (of whom the defendant was one) to the following effect:

"Within a period of ten years from this day, the son that may be born to Lakshmanan (plaintiff) who is now adopted to Pichaikutti shall be got adopted to Egamai the wife of Arunachala or a son from the outside shall be adopted. The said adopted son of Egamai and Pichaikutti's son Lakshmana shall enjoy in equal halves all the properties".

Since the adoption plaintiff has been living with Valliammai and Egamai in a portion of the family house, the other portion being in defendant's occupation. About a month after the adoption, the plaintiff was married, the defendant playing the role which according to the custom of the community is assigned to the nearest agnatic kinsman in that function, particularly the attestation of a document called "Esaikkudimanam" (Ex. B in this case). Egamai does not appear to have yet taken anybody in adoption.

The plaintiff has filed this suit claiming a division of and possession of a half share in the properties of which he alleges he is in possession as a "tenant in common" with the defendant and which according to him belong in common to the defendant's branch and to Pichaikutti's branch. Defendant disputes the validity of plaintiff's adoption and contends that at all events it is Egamai that is entitled to Arunachalla's share. Plaintiff relies on custom to validate the adoption and give him a title to the property.

The pleadings are open to the criticism that the custom relied on by the plaintiff was never clearly or definitely formulated. Even issue 13 does not make any reference to the results of the adoption, assuming it to be valid. The points at issue between the parties as they finally emerged are (*i*) whether the adoption of an orphan boy is permitted by the custom of the community (*ii*) whether custom permits a mother-in-law to make an adoption notwithstanding the existence of a daughter-in-law in whom the son's estate had vested at his death and (*iii*) if the first two questions are answered in the affirmative, what exactly is the status and what are the rights of the boy so adopted. The second question was raised before this Court on a previous occasion (in A.S. 158 of 1932 and 374 of 1933) but the learned Judges gave no finding on it, as they found it possible to dispose of the case on another ground. It may however be mentioned that in that case the lower Court gave a finding in favour of the existence of the custom. In the present instance also, another Subordinate Judge has come to an affirmative conclusion on the 1st and 2nd of the points above set out.

On behalf of the appellant, Mr. T. M. Krishnaswami Aiyar raised before us a contention that in this case there is no proof at all of the plaintiff having been taken in adoption,

Subramanian Chettiar v. Somasundaram Chettiar.

Varadachariar, J.

because nothing is spoken to by the witnesses beyond the execution of a muri. We do not think it right to allow such a contention to be raised at this stage. The plaintiff's adoption as a fact was not disputed in the written statement or in the course of the evidence. The plaintiff's witnesses no doubt speak prominently to the execution of the muri and to the part that the defendant took in that connection but that is apparently because the defendant attempted to minimise the importance of the part he then took. The defendant was admittedly present at the time, he admits that a number of relatives who had assembled for another function also attended the plaintiff's adoption. The defendant throughout speaks of the adoption as an accomplished fact and has nowhere suggested that any particular act which according to the custom of the community was *necessary* to constitute an adoption was absent in this case. There was of course no 'giving' of the boy by elders—as plaintiff says, he gave himself, but that is a matter to be discussed when dealing with the first of the questions above set out, namely, as to the validity of the adoption of an orphan. It is clear that in the Chetti community very great importance is attached to the execution of the adoption muri and it has not been suggested that Ex. A was brought into existence with a view to a contemplated adoption which did not in fact take place. We have therefore decided to deal with the case on the footing that the plaintiff went through whatever was according to the custom of the community necessary to constitute the ceremony of adoption. Feasting and making presents are optional and their absence cannot constitute a defect in the necessary ceremonial.

The practice of taking orphan boys in adoption may well be said to be established by the evidence in the case. The instances spoken to are no doubt comparatively recent but that is a limitation arising from the very nature of oral evidence. The evidence on the point is all one way and no witness has been called on the side of the defendant either to deny the existence of the practice or even to suggest that such adoptions are looked upon with disfavour in the community. The title of such boys to the properties of their adoptive parents seems to have been admitted in all cases as a matter of course. The conduct of the defendant himself in connection with Ex. A and Ex. D and the conduct of the other Panchayatdars who took part in Ex. DD are also not without significance in this con-

Subramanian Chettiar v. Somasundaram Chettiar.

Varadachariar, J.

nection: (*See* observation of the Privy Council in *Ram Kishore* v. *Jainarayan*[1].). We therefore see no reason to differ from the conclusion of the learned Subordinate Judge that the plaintiff's adoption cannot be held to be invalid merely on the ground that he was an orphan at the time of the adoption. We are however not prepared to go so far as his statement would seem to imply when he says that in the Chetti community the motive that operates in connection with adoptions is secular. In other sections of the Hindu community also, the secular motive is not without importance; and even amongst Chettis the religious motive is not absent. We cannot agree that the case could or should be assimilated for instance, to adoptions amongst communities like Jains where the religious motive has no place.

The evidence does not however establish what exactly are the rights of an orphan boy taken in adoption. The witnesses speak only to his enjoyment of the properties of his adoptive parents. The adoption will not satisfy the definition of a *Dattaka* adoption and we do not wish to be understood as deciding that in this community, an orphan boy when adopted will as a matter of law (apart from proof of custom when necessary) acquire *all* the rights which under the general Hindu Law are recognised in favour of a *Dattaka* son. It must not be forgotten that when and in so far as Hindu usage recognised other forms of adoption or affiliation besides the *Dattaka*, it did not always accord to persons so adopted all the rights given to a *Dattaka*, nor impose on him the same disabilities; cf. *Jiwan Mal* v. *Jamna Das*[2], *Tirath Ram* v. *Mst. Kahan Devi*[3], and *Kanhaiya Lal Sahu* v. *Mussammat Suga Kuer*[4]. On the second of the points above set out, the evidence establishes 8 or 9 instances. Out of these, in all except two, adoptions were said to have been made both by the daughter-in-law and by the mother-in-law; and by arrangement between the parties both the adopted boys are said to have shared the estate. Mr. Krishnaswami Iyer has advanced four contentions in this connection. He pointed out that none of the instances spoken to by the witnesses relates to the Illuppukkudi sub-division of the Chetti community to which the parties to this suit belong and he also contended that the instances are after all too few and recent to establish a custom for the whole community. We do

1. (1921) 42 M.L.J. 80: L.R. 48 I.A. 405: I.L.R. 49 Cal. 120, 131 (P.C.).
2. (1910) 10 I.C. 822.
3. (1920) I.L.R. 1 Lah. 588.
4. (1925) I.L.R. 4 Pat. 824.

Subramanian Chettiar v. Somasundaram Chettiar.

Varadachariar, J.

not feel that there is much force in the first objection, no distinction on this ground seems to have been suggested in the course of the trial and it does not appear that there is any marked difference in practice between this and the other subdivisions of the community. The second objection has greater force and we should have hesitated to accept the conclusion of the lower Court on this part but for the fact that we find it possible in the circumstances of this case to limit our decision to one between the parties. This course has been adopted by the Privy Council in some instances, even when questions of custom were raised; See *Rupchand* v. *Jambu Prasad*[1], *Chiman Lal* v. *Hari Chand*[2] and *Parshottam Ganpat* v. *Venichand Ganpat*[3]. As pointed out by Mr. Golap Chandra Sarkar (Law of Adoption, Lecture V) when discussing *Rungamma* v. *Atchama*[4], Hindu opinion has long been divided on the question of multiple adoptions and where there are more widows than one, whether co-widows, or daughter-in-law and mother-in-law, the sentiment in favour of each having a boy adopted by herself, though in theory to her husband, has been pretty strong in the Hindu community. Amongst the instances spoken to in this case, we find one or two where a person adopted a boy even *after* the daughter-in-law had adopted a son, whereas under the Hindu Law there is a grandson by adoption. The language employed by Lord Kingsdown in *Booban Moyee Debia* v. *Ram Kishore Acharjee Chowdhry*[5], seems to suggest that it is against the policy of the law generally to permit an adoption by the mother-in-law after the estate had vested in the daughter-in-law. In this view it might be said that a custom, even if established, would be invalid as opposed to public policy. But as recent cases have not re-affirmed this ground but have based the termination of the mother's power on religious grounds, the possible objection based on public policy need not be examined.

Mr. Krishnaswami Iyer's third contention is based on the fact that in all the instances spoken to by the witnesses the rights of the parties were regulated by family settlement. He drew our attention to the observations of the Judicial Com-

---

1. (1909) 20 M.L.J. 439: L.R. 37 I.A. 93; I.L.R. 32 All. 247 (P.C.).
2. (1913) L.R. 40 I.A. 156: I.L.R. 40 Cal. 879 (P.C.).
3. (1920) I.L.R. 45 Bom. 754.
4. (1846) 4 M.I.A. 1.
5. (1865) 10 M.I.A. 279 at 310.

mittee in *Abdul Hussein Khan* v. *Sona Dero*[1], to the effect that arrangements resting upon such agreements, far from proving a custom binding of its own force, destroy the custom. We do not agree that their Lordships' observation could be taken out of its context and made to support a general proposition in the form put forward by Mr. Krishnaswami Iyer. There was a body of respectable evidence in that case denying the existence of the custom pleaded and it was in appraising the value of the conflicting testimony that the Judicial Committee made the above observation. This is shown by their concluding observation on p. 468 that:

> "Although there is much reason in history for the custom alleged and some evidence by which it receives support, yet on the whole the evidence has fallen short of the standard to which it must attain in order to succeed in altering the devolution of property according to Mahomedan Law to a devolution determined by a family custom".

On the other hand, in *Palaniappa Chettiar* v. *Alagan Chetti*[2], where they were dealing with a custom alleged to exist in the Chetty community, their Lordships note a similar argument on p. 750 and answer it by pointing out that the witnesses who spoke to these documents or arrangements also gave the oral evidence in favour of the custom. The evidence in the present case is of the same kind.

The appellant's last contention is based upon the fact already noticed that in most of the instances spoken to in the evidence two adoptions are said to have been made, one by the mother-in-law and the other by the daughter-in-law. This may be more fully discussed when dealing with the third question as to the rights of boys thus adopted. At this stage we will only observe that so far as the prevalence of the practice is concerned, it seems to us to make no difference on the question of fact that an adoption in such cases is also made by the daughter-in-law. Mr. Patanjali Sastri insisted that a differentiation on this ground was not suggested in the course of the trial and contended that if it had been so suggested it might have been possible for his client to adduce evidence of a large number of instances where adoption was made by the mother-in-law. He also relied strongly on Exs. A and D as showing the consciousness of the defendant and of those who took part in them that an adoption might be made by the mother-in-law

---

1. (1917) 34 M.L.J. 48: L.R. 45 I.A. 10: I.L.R. 45 Cal. 450 at 467.
2. (1921) L.R. 48 I.A. 539: I.L.R. 44 Mad. 740 (P.C.).

Subramanian Chettiar v. Somasundaram Chettiar. — Varadachariar, J.

independently of and long before an adoption by the daughter-in-law, because Ex. DD, contemplates an adoption by the daughter-in-law only some years later while Ex. A proceeds on the footing that the son adopted by the mother-in-law will immediately get the property. It cannot be denied that this last contention is well founded, at any rate, as against the defendant. Mr. Krishnaswami Iyer argued that Ex. A merely contemplates the acquisition by the plaintiff of such property as might be regarded as Pichaikutti's even at the date of the plaintiff's adoption and not of the property of Arunachala. We are unable to put such a construction upon Ex. A. Arunachala must on his adoption have inherited the whole estate of Pichaikutti and it will be meaningless to suggest that the parties to Ex. A., contemplated some property of Pichaikutti, other than what had vested in Arunachala, being still available for the plaintiff.

The last question *viz.*, that relating to the rights flowing from such adoption has caused us greater difficulty. Mr. Patanjali Sastri maintained that once custom is invoked to validate an adoption by the mother-in-law even when there is a daughter-in-law, it would follow as a matter of *law,* that a son thus adoped by the mother-in-law would divest even the daughter-in-law of the estate vested in her as heir to her husband. We are not able to accept this contention. It seems to us in the first place doubtful whether it would be proper to attach to an adoption which *ex-hypothesi* is opposed to the general Hindu Law but is only sought to be validated by custom all the legal consequences which the general law would attach to an adoption valid under the general law. We do not however pursue this point because we are not satisfied that under the general law itself, an adoption like that of the plaintiff (assuming it to be valid) will have the effect of divesting the daughter-in-law of the estate which she had taken as her husband's heir.

We may refer in this connection to the judgment of the Calcutta High Court in *Padma Kumaree Debee* v. *J. Kishore Acharjee*[1], where the learned Judges interpreted the decision of the Privy Council in *Bhoobon Moyee Debia* v. *Ram Kishore Acharj Chowdhry*[2], as not invalidating the adoption by the

1. (1879) I.L.R. 5 Cal. 615. 2. (1865) 10 M.I.A. 279.

Subramanian Chettiar v. Somasundaram Chettiar.

Varadachariar, J.

mother-in-law but only as precluding the divesting of the estate vested in the daughter-in-law. This decision of the Calcutta High Court was reversed by the Privy Council in *Padmakumari Debi Chowdhrani* v. *Court of Wards*[1], where their Lordships declared that the effect of the decision in *Bhoobanmayee's case*[2] was also to invalidate the adoption on the footing that the mother-in-law's power of adoption had come to an end on the vesting of the estate in the daughter-in-law. But the High Court Judgment at least shows that the assumption of the validity of the adoption by the mother-in-law will not necessarily involve the conclusion that the estate of the daughter-in-law must be divested; (*Cf.* the opinion of Reilly, J., in *Sukdevdoss Ramprasad* v. *Mussamat Choti Bai*[3].) Mr. Patanjali Sastri pointed out that the Judgments in *Amarendra Mansingh* v. *Sanatan Singh*[4] and *Vijayasinghji* v. *Shivasangji*[5], have greatly limited the effect of their Lordship's observations in *Booban Moyee Debia* v. *Ram Kishore Acharj Chowdhry*[2]. It is true that the recent decisions have to some extent dissociated the question of the termination of a widow's power to adopt from that relating to the vesting and divesting of the estate. But it does not seem to us to follow that the conclusion in favour of the continuance of the widow's power of adoption will necessarily justify the conclusion that the person so adopted will, regardless of other considerations, also divest everybody who might in the interval have taken the estate which once belonged to the adoptive father.

The basis on which a son adopted by a mother succeeding as heir to her son could divest the mother herself of the estate so inherited by her has been the subject of some discussion (see *Rai Jatindranath Chaudhuri* v. *Amirta Lal Bagchi*[6]) and it was till recently assumed that in cases where the adoption is not to the last male holder, the adopted son can only divest the estate vested in the adopting mother. The Bombay High Court sometimes added an exception based on the consent of the persons in whom the estate was for the time being vested; (Cf. *Payapa* v. *Appanna*[7]). The decision of the Privy Council in *Amarendra Mansingh* v. *Sanatan Singh*[4] and *Vijyasinghji* v. *Shivasangji*[5], seem however to assume that even the estate

1. (1865) 10 M.I.A. 279.
2. (1881) I.L.R. 8 Cal. 302.
3. (1927) 27 L.W. 145.
4. (1933) I.L.R. 12 Pat. 642.
5. (1935) I.L.R. 59 Bom. 360 (P.C.).
6. (1900) 5 C.W.N. 20.
7. (1898) I.L.R. 23 Bom. 327.

Subramanian Chettiar v. Somasundaram Chettiar.

Varadachariar, J.

vested in a *collateral* on the death of the son may be divested by a son adopted by the mother. The question nevertheless remains how far these two decisions can be held to overrule the principle enunciated by Lord Kingsdowne in *Booban Moyee Debia* v. *Ram Kishore Acharj Chowdhry*[1], that under the Hindu Law a "person to succeed must be the heir of the last full owner". In the present case, as in *Bhoobanmayees' case*, the first adopted son was the last full owner and the inheritance must be traced to him. The nearest heir on that footing will be his widow and not the plaintiff, even if by a fiction of law the plaintiff could be assumed to have become a member of this family at the moment of Arunachala's death. On the other hand in *Amarendra Mansing* v. *Sanatan Singh*[2] and *Vijaya Singhji* v. *Shivasangji*[3], the estate had temporarily vested in a distant collateral who would only be a remoter heir, if by fiction the adopted son could be deemed to have been in existence as such at the moment of the first son's death or civil death. How far the doctrine of relation back of the adopted son's title can be carried in cases where inheritance is not to be traced directly to the adoptive father can by no means be regarded as settled; (Cf. *Bhubaneswri Debi* v. *Nilcomul Lahiri*[4] and *Veeranna* v. *Sayamma*[5]). Mr. Patanjali Sastri suggested that the fiction of the plaintiff's existence as Pitchaikutti's son must be carried back to the date of Pichaikutti's death (and not merely to the date of Arunachala's death); and, if on this assumption the plaintiff and Arunachala could be regarded as undivided coparceners, he said, the plaintiff would take the property of Arunachala by survivorship even in preference to Arunachala's widow. But even a fiction cannot be carried to its logical limits; and in this case, it seems unreasonable to postulate the legal existence of plaintiff's title as that of a coparcener of Arunachala because as long as Arunachala was alive his existence would itself be a bar to any adoption by his mother and plaintiff *could* not have become Pichaikutti's son during Arunachala's life time.

Mr. Sastri next contended, in the alternative, that even as a matter of *custom* the evidence establishes that the son

---

1. (1865) 10 M.I.A. 279 at. 311.
2. (1933) I.L.R. 12 Pat. 642.
3. (1935) I.L.R. 59 Bom. 360 (P.C).
4. (1885) L.R. 12 I.A. 137.
5. (1928) 56 M.L.J. 401: I.L.R. 52 Mad. 398.

adopted by the mother-in-law in such circumstances divests the daughter-in-law. It is in this connection that Mr. Krishnaswami Iyer's argument becomes important, that where the daughter-in-law *also* makes an adoption the boy adopted by her would undoubtedly divest her and arrangements entered into by or on behalf of that boy whereby some property is given to the boy adopted by the mother-in-law cannot prove that the latter is *in his own right* entitled to divest the daughter-in-law. As stated already there are only two instances, referred to in the evidence, of adoptions by the mother-in-law alone. Mr. Patanjali Sastry was therefore obliged to rely on Ex. A and DD and the subsequent conduct of the defendant (including his part in Ex. B and Ex. Y) as sufficient to establish plaintiff's right, *as against the defendant*, to possession of Pichaikutti's share. He referred us in this connection to the observations in *Ramalinga Pillai* v. *Sadasiva Pillai*[1] and *Sooratha Singa* v. *Kanaka Singa*[2]. In the former case, the plaintiff's adoption was sought to be invalidated on two grounds; (*i*) that the adoptive father was in pollution at the time of the alleged adoption and (*ii*) that the plaintiff was his sister's son. After referring to the several occasions on which the plaintiff was styled as adopted son by the defendant's father, their Lordships observed (on p. 515):

"If there were no adoption at all or if the actual adoption were for any reason legally invalid, the Respondent would of course not be entitled to that designation. They amount therefore to a complete admission of the whole title of the Respondent both in fact and in law and show that the objections which have been urged to his claim, in the opinion of the appellant's father, who probably was well acquainted with all the circumstances and may be assumed to have known Hindu Laws and customs, had no foundation".

In *Sooratha Singa* v. *Kanaka Singa*[2], where the question related to the existence of a custom permitting the adoption of a brother's daughter's son, Sadasiva Iyer, J., referred to an admission made by the objector and on the authority of the decision in *Ramalinga Pillai* v. *Sadasiva Pillai*[1], observed, that:

"It was an admission both of the fact and of the validity of the defendant's adoption. The burden of proving that it was not valid was therefore shifted".

An admission could of course be explained away, but the defendant has not, seriously attempted to do so in the present case. Again, on a mere point of law an

1. (1864) 9 M.I.A. 506. 2. (1919) I.L.R. 43 Mad. 867.

Subramanian Chettiar v. Somasundaram Chettiar.

Varadachariar, J.

admission may not be of such significance, but where the question raised is one of *custom*, the position is different. Finally, as observed in *Tayammal* v. *Seshachala Naicker*[1], where the person whose conduct is relied on could hardly have distinguished "between an adoption in fact and a legal adoption" and the facts ascertained in the case *disprove* the adoption, presumptions arising from conduct may not be of any value; but it was recognised in the same passage that 'upon a question which depended upon the preponderance of evidence' acts of acquiescence would be important. We accordingly accept the lower Court's conclusion to this extent, that *as against* the defendant, the evidence is sufficient to establish that plaintiff was entitled to the half share which Pichaikutti and Arunachala were entitled to, in the common properties of the two branches. Egamai is not a party to this suit nor has she even been examined as a witness in the case. The evidence does not show whether she was a party to DD or consented to plaintiff's adoption. We do not therefore wish to be understood as expressing any opinion in respect of plaintiff's rights as against Egamai or as against any son that she may take in adoption.

The plea of estoppel (raised by issue 12) was not pressed before us. But we think it right to point out that the decision in *Dhanraj Joharmal* v. *Soni Bai*[2], does not preclude a plea of estoppel, as between certain parties, even on a question of adoption; there can of course be no estoppel arising out of representation on a mere point of *law*. In the case before their Lordships, the decision turned on the distinction (which they emphasise on p. 495) between an ordinary Agarwalla adoption 'and the regular Hindu or Brahminical adoption', on the assumption that rights of collateral succession arise only in the latter case. On this footing, the Board held that 'the representation and acts of Ramdhan' only relate to a secular or Agarwalla adoption.

The decree of the lower Court in this case, may, it seems to us, also be supported on another ground. The defendant is admittedly entitled only to a half share in whatever may be found to be the common property of the two branches. As regards the other half, his plea is really one in the nature of

1. (1865) 10 M.I.A. 429 at 433.
2. (1925) 49 M.L.J. 173: L.R. 52 I.A. 231: I.L.R. 52 Cal. 482 (P.C.).

Subramanian Chettiar *v.* Somasundaram Chettiar.

Varadachariar, J.

jus tertii. Such a plea may be available in an action in ejectment, *i.e.*, where the plaintiff is not in possession (see *Chandrika Baksh* v. *Indar Bikram Singh*[1]) but the evidence in this case establishes that the plaintiff is in *legal* possession of the properties along with the defendant, having been so admitted to possession by the defendant himself on the assumption that the plaintiff was entitled thereto. Valliammai and Egammai are living with the plaintiff and Egammai has not so far disputed plaintiff's right or title. In these circumstances it seems to us proper to allow the plaintiff to convert his "common" possession of the whole into separate possession of a half share, as against the defendant and leave it to Egammai, if she so chooses, to assert her rights, if any, as against the plaintiff in due course. We are unable to accept Mr. Krishnaswami Iyer's contention that the defendant can treat the plaintiff as a trespasser on property held by the defendant and Egammai as tenants-in-common.

The decree of the lower Court covers four items of immovable property. Of these, there is no dispute as to the common title of the two branches in respect of item 4, items 1 to 3 were claimed by the defendant as exclusively his own but this claim was negatived by the lower Court and a division was directed even of these items. The same contention has been repeated before us; but we see no sufficient reason for differing from the conclusion of the lower Court. It is true that the sale deeds stand in the sole name of defendant's adoptive father; but it cannot be denied that out of the consideration for the purchase of item 11 (under Ex. MM-1 and MM) the amount paid for MM-1 was debited to the common account and the major portion of the consideration for MM namely the mortgage-debt under LL was a common asset of the family. We are not prepared to accept the appellant's suggestion that out of this mortgage-debt, the share of Pichaikutti branch has been acquired by defendant's branch. Again, though the Hundi for the purchase money under Ex. G (for item No. III) has been paid out of defendant's account in the Colombo R. M. A. R. R. M. firm, the Hundi itself has been drawn in the common vilasam and not in the Thanathu vilasam of the defendant's father. It was debited in the Colombo firm to defendant's account apparently because the common vilasam had no ledger

1. (1916) I.L.R. 38 All. 440 (P.C.).

Subramanian Chettiar v. Somasundaram Chettiar.

Varadachariar, J.

there. How this amount and the other items of receipts and disbursements referred to by the lower Court have been dealt with as between the two branches can be made clear by the production of the accounts of the defendant's father and of the defendant but the defendant has denied existence of such accounts—a statement which the lower Court has rightly declined to believe. P. W. 18 speaks positively to the acquisition of these items for the common benefit and his testimony has not been shown to be unreliable. There is also other evidence on the plaintiff's side, which the learned Judge has accepted, of such enjoyment by the plaintiff of these properties as their nature permits. The defendant's attempt to explain away such acts of enjoyment as permissive has not been successful.

The appeal accordingly fails and is dismissed with costs.

S. V. V. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW.

Konda Moopan *alias* Gopal Naicker .. *Accused** (*in Calandar Case No. 781 of 1936 on the file of the Court of the 2nd Class Magistrate of Aruppukottai*).

Konda Moopan *In re.*

Criminal Procedure Cede (V of 1898), S. 35—Sentence in default of fine—If Court can direct it to run concurrently.

S. 35 of the Criminal Procedure Code, deals only with sentences of imprisonment or transportation and not of fine and as such a criminal Court is not competent to direct that sentences of imprisonment imposed for default in payment of fines should run concurrently.

Case referred for the orders of the High Court under S. 438 of the Criminal Procedure Code, by the District Magistrate of Ramnad in his letter dated 30th October, 1936, R. O. C. No. 3, 5541 of 1936.

Parakat Govinda Menon for *The Public Prosecutor* on behalf of the Crown.

Accused unrepresented.

The Court made the following

ORDER.—The question raised in this reference by the District Magistrate of Ramnad is whether a Criminal Court is

* Crl. R. C. 801 of 1936. 27th November, 1936.
Case Ref. 54 of 1936.

competent to direct that sentences of imprisonment imposed for default in payment of fines should run concurrently. The section that relates to this subject is S. 35 of the Code of Criminal procedure and the words of the section show that the direction can be given only in respect of sentences of imprisonment or transportation. The point appears to be covered by authority as will be seen from the decisions in *Imperator* v. *Akidullah*[1], *Emperor* v. *Sesha Rao*[2], *Shidlingappa Gurulingappa* v. *Emperor*[3] and *Emperor* v. *Gulam Ahamad*[4], the last three cases being rulings by Benches of the High Courts concerned. It follows therefore that the direction of the sub-Magistrate in this case awarding sentences of imprisonment in default of payment of the fines imposed by him is illegal and it is therefore cancelled.

Konda Moopan, *In re.*

S. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE MOCKETT AND MR. JUSTICE LAKSHMANA RAO.

Pujari Hanumanthappa .. *Petitioner* (Accused).*

Hanumanthappa, *In re.*

Madras Abkari Act (I of 1886), S. 58—Proof of offence under—Illicit possession of arrack—Appeal against conviction—Appellate Magistrate holding possession not to be illegal—Order for fresh trial—Propriety—Criminal Procedure Code (V of 1898), S. 428.

The accused was charged for offences under Ss. 55 and 58 of the Madras Abkari Act and was convicted under S. 58 of the said Act. He preferred an appeal and the Appellate Magistrate while holding that it had not been proved that the arrack was illicit observed that " on the whole he was not of opinion that on the evidence there were sufficient grounds for acquitting the appellant" and ordered further enquiry. The accused preferred a revision to the High Court challenging the validity of the said order.

Held, that the gist of the offence under S. 58 of the Madras Abkari Act was that the arrack was illicit, and that in the absence of proof of the same the accused was entitled to an acquittal.

The object of S. 428, Criminal Procedure Code, is not to enable the prosecution, having failed once, to have an opportunity of trying the case all over again or to produce evidence which could easily have been produced at the first trial.

Jeremiah v. *Vas*, (1911) 22 M.L.J. 73: I.L.R. 36 Mad. 457 and *Rathnavelu Mudaliar* v. *Emperor*, (1930) M.W.N. 47, referred to.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of

---

1. (1911) 15 I.C. 808.
2. A.I.R. 1926 Bom. 62.
3. A.I.R. 1926 Bom. 416
4. (1929) 188 I.C. 224.

* Cr. R. C. No. 318 of 1936.
Cr. R. P. No. 294 of 1936. 6th October, 1936.

Hanumanthappa, *In re.*

the Court of the Joint Magistrate, Hospet, dated the 23rd March, 1936 and made in C. A. No. 4 of 1936 preferred against the order of the Court of the Stationary Sub-Magistrate, Hospet in C. C. No. 22 of 1936.

K. S. Jayarama Aiyar and *G. Gopalaswamy* for Petitioner.

A. Narasimha Aiyar for *The Public Prosecutor* (*L. H. Bewes*) on behalf of the Crown.

The Judgment of the Court was delivered by

Mockett J.

Mockett, J.—The accused was charged before the Stationary Sub-Magistrate, Hospet, with an offence under Ss. 55 (*a*) and 58 of the Madras Abkari Act. He was convicted under S. 58. He appealed to the Joint Magistrate, Hospet, and on that appeal, the following took place. The Joint Magistrate found that it had not been proved that the arrack was illicit; that is shortly the effect of his finding. Certain evidence was given with regard to the arrack, but he said, and we think quite rightly, that that evidence did not establish that the arrack was illicit. Now proof that that arrack is illicit is the essence of the offence under S. 58 of the Act. The Joint Magistrate, having arrived at that finding, said:

"On the whole, I am not of opinion that on the evidence there are sufficient grounds for acquitting the appellant".

We are unable to understand that statement, because if the offence had not been proved, by reason of the failure of proof of its most essential factor, it is obvious that the appellant was entitled to an acquittal. However, having said that, the learned Joint Magistrate proceeded to express the opinion that it was desirable that there should be a fresh enquiry into the case. He therefore set aside the finding and sentence of the lower Court, and remanded the case under S. 423 (*b*) (1) Criminal Procedure Code, for a fresh enquiry. He presumably purported to act under S. 428. It has been laid down by this High Court in several cases of which the following are examples, *Jeremiah* v. *Vas*[1] and *V. M. Rathnavelu Mudaliar* v. *Emperor*[2] that the object of S. 428 is not for the purpose of enabling the prosecution to produce evidence which could easily have been produced at the first trial. It is not to enable the prosecution, having failed once, to have an opportunity of trying the case all over again. That is substantially what has

1. (1911) 22 M.L.J. 73: I.L.R. 36 Mad. 457.
2. (1930) M.W.N. (Crl.) 47.

been done here. Moreover, the Public Prosecutor is not even able to assure us that the necessary additional evidence is in existence. Under these circumstances, the order for further enquiry is set aside and the petitioner is acquitted. His bail bond, if any, will be cancelled.

Hanumanthappa, *In re.*

Mockett, J.

B. V. V. —— *Petitioner acquitted.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE MADHAVAN NAIR AND MR. JUSTICE STODART.

Sendattikalai Pandia Chinna Thambiar (deceased) and another .. *Appellants** (*Plaintiff and Nil*)

v.

Sangili Veerappa Pandian *alias* Thangaswami and others .. *Respondents* (*Defendants*).

Transfer of Property Act (IV of 1882), S. 36—Zemindār—Rent due from lessees and occupancy ryots—Death of Zamindar in the middle of the fasli—Rents, if apportionable or goes with the Zamindari.

Pandia Chinna Thambiar *v.* Veerappa Pandian.

Where a Zemindarini died on 23rd November, 1916, in the middle of fasli 1326, the rents and profits of the estate due for the fasli which consisted (*i*) of moneys due by lessees of topes and forests and (*ii*) of moneys due as rent from occupancy ryots in respect of their lands are both to be apportioned between the personal heirs of the Zemindarini and the succeeding Zemindar, (on the principle enacted in S. 36 of the Transfer of Property Act) on grounds of justice, equity and good conscience, in proportion to the period during which the Zemindarini was alive. The amount representing the proportionate income for the period of her life is to be treated as her property and not as forming part of Zemindari estate and is to go to her heirs. There is no distinction between the two kinds of rents for this purpose.

Phirozshaw Bomanjee v. *Bai Goolbai*, (1923) I.L.R. 47 Bom. 790 (P.C.), has not overruled the previous decisions of this Court to the above effect.

Shivaprasad Singh v. *Prayagkumari Debee*, (1933) I.L.R. 61 Cal. 711 and *Aparna Debi* v. *Sree Sree Shiba Prasad Singh*, (1924) I.L.R. 3 Pat. 367, followed.

Appeal against the order of the Court of the Subordinate Judge of Tuticorin, dated 5th September, 1928 and made in I. A. No. 1102 of 1921 in O. S. No. 27 of 1914.

A. S. Visvanatha Aiyar for Appellants.

S. Ramaswami Aiyar, K. Raja Aiyar and K. S. Rajagopalachari for Respondents.

---

* Appeal No. 485 of 1930. 2nd October, 1936.

Pandia Chinna Thambiar v. Veerappa Pandian.

Madhavan Nair, J.

The Judgment of the Court was delivered by

Madhavan Nair, J.—The plaintiff in O. S. No. 27 of 1914 on the file of the Court of the Subordinate Judge of Tuticorin (the petitioner in the lower Court) is the appellant. The appeal arises out of an application for passing a final decree in that suit. In O. S. No. 27 of 1914 the plaintiff as reversioner claimed for himself the Zamindari of Sivagiri on the death of the then Zamindar Ramalinga who died in the year 1914. The claim was made against the mother of the Zamindar who took possession of the Zamindari on his death. Along with this suit was tried another suit O. S. No. 48 of 1914, the plaintiff in which admitting the right of the Rani claimed that he was the next reversioner entitled to the Zamindari on her death. The Rani died on the 23rd November 1916, while the suits were in progress and the plaintiff in O. S. No. 48 of 1914 was then made the second defendant in O. S. No. 27 of 1914. The decrees passed in these two suits were appealed against, to the High Court and the judgments are reported in *Gurusami Pandiyan* v. *Pandia Chinna Thambiar*[1]. For the purpose of this appeal it is enough to say that the High Court held that the Rani succeeded to the Zamindari in preference to the plaintiff and that the income accruing from it during her lifetime was her property and that after her death the plaintiff, as one of her heirs, can claim only one sixth of what was left. The decree of the Lower Court was modified by the High Court giving to the plaintiff as one of her heirs only one sixth share in her estate, including the profits that accrued from the impartible estate up to her death, he of course being entitled to the whole of it thereafter. In the partible properties and in the outstandings and in the past profits that accrued during the Rani's life time there was a declaration that the plaintiff and defendants 2 and 6 are each entitled to one-sixth share and a final partition decree was ordered to be drawn up by the Subordinate Judge regarding them. It is not necessary to refer to the other portions of the decree. See *Gurusami Pandiyan* v. *Pandia Chinna Thambiar*[1].

In the present case we are concerned only with the partition of the income which the Rani was entitled to on account of the land revenue and leases from tope and forests for fasli

1. (1920) 39 M. L. J. 529: I.L.R. 44 Mad. 1.

Pandia Chinna Thambiar *v.* Veerappa Pandian.

Madhavan Nair, J.

1326. It may be mentioned that a receiver was in possession of the property during the life time of the Zamindarini. Fasli 1326 commenced from 1st July 1916, and as the Rani died on the 23rd November 1916, we are concerned with five-twelfth of the income due to the Rani which amounted to Rs. 21,079. Plaintiff claimed that the rents and profits of the estate for fasli 1326 including that part of them which remained unrealised at the death of the Rani should go with the estate and should be paid to him. The respondents contended that the said rents and profits should be divided, part going to the personal heirs of the Rani (of whom plaintiff is one) in proportion to the period during which the Rani was in possession, namely from 1st July 1916 to 23rd November 1916. On one calculation the plaintiff gets the whole; on respondents' calculation he gets as co-heir with defendants 2 to 6 only one sixth of the income which is attributable to the aforesaid period. The Lower Court in drawing up its final decree decided in respondents' favour holding that plaintiff had withdrawn his objections at the stage when the Commissioner's report came up for consideration. It is now agreed that plaintiff never did this. On plaintiff's appeal we have to decide the question as one of first instance.

The rents and profits of the estate in the fasli in question consisted of money due by *lessees* of topes and forests and money due as rent from occupancy ryots in respect of their lands. It is now agreed that the former became payable at the beginning of the fasli and are divisible in the proportion stated by the respondents. Then remain the rents due by occupancy tenants which became payable in instalments beginning in December, the month following the death of the Rani. We may say at the outset that whatever rule may be applicable to rents payable on dates certain in respect of ordinary leases, the rents payable by occupancy tenants stand on a different footing. In theory landlord and tenant are co-owners. The rents payable by the latter represent a share of the crop and there are still estates where the landlord takes his share by division of the actual grain at the threshing floor. Where the landlord—properly called the landholder in the case of such estates—receives his rent in money, the time when it is made payable is fixed by custom with a view to the convenience of the occupancy tenant and not in pursuance of any contractual agreement between the parties. In this view it might be said that

Pandia Chinna Thambiar v. Veerappa Pandian.

Madhavan Nair, J.

the land holder becomes entitled to his rent—considered as a sum paid in commutation of his share of the produce—even while the crops are on the ground.

The plaintiff contended in the lower Court and the same contention is urged before us—that he is entitled to the whole income, the ground being that in law the income for the fasli cannot be apportioned.

The law as to the apportionment of periodical payments on determination of the interest of the person entitled is provided for in India in S. 36 of the Transfer of the Property Act, which runs as follows:

> "In the absence of a contract or local usage to the contrary, all rents, annuities, pensions, dividends and other periodical payments in the nature of income shall, upon the transfer of the interest of the person entitled to receive such payments, be deemed as between the transferor and the transferee to accrue due from day to day, and to be apportionable—accordingly, but to be payable on the days appointed for the payment thereof".

In England under the common law there was no apportionment in respect of time except in the case of interest which accrued from day to day. As to rent and other periodical payments, the contract being considered as distinct and entire, no apportionment was allowed; *see* the judgment of Lord Eldon in *Ex parte Smyth*[1], and the note appended to the report by Mr. Swanston. This rule in England was altered by the Apportionment Act of 1870, S. 2 of which says:

> "From and after the passing of this Act all rents, annuities, dividends and other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise) shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly".

The law enacted in S. 36 of the Transfer of Property Act is limited to transfers *inter vivos* and does not, strictly speaking, apply to cases of devolution of interest on succession. It is therefore argued that inasmuch as S. 36 does not apply in terms, the law of apportionment applicable to the present case is the old English Common law under which there cannot be any doubt that apportionment in the case before us is impossible. But in a series of cases of this Court, though S. 36 was held inapplicable the principle underlying the Section has been applied consistently on the ground of equity and good conscience. In *Lakshmi Naranappa* v. *Meloth Raman Nair*[2], a tenant-for-life

---

1. (1818) 1 Swans. 337: 36 E.R. 412.
2. (1920) I.L.R. 26 Mad. 540,

Pandia Chinna Thambiar *v.* Veerappa Pandian.

Madhavan Nair, J.

leased immovable property to tenants at a rent which was payable in half-yearly instalments. Four days before an instalment was due, the tenant-for-life died, and the assignee of his interest sued the tenants for the rent. It was held that he was entitled to recover. Subrahmania Aiyar, J., pointed out:

" It seems to me, therefore, that in the absence of a specific rule applicable to cases like the present in this country, we are entitled to follow the broad and just principle underlying the English Statute Law culminating in the Apportionment Act of 1870 and hold that, as a matter of equity and good conscience, the plaintiff in this case is entitled to the apportionment made by the decree of the Lower Appellate Court . . ."

Davies, J., without relying on the broad principle of equity referred to by Subrahmania Aiyar, J., held that the plaintiff was entitled to recover on the ground that half-yearly instalment had fallen due prior to the death of the tenant-for-life though the right to sue for it might not have accrued until four days after. In *Kunhi Sou* v. *Mulloli Chathu*[1], it was held that an assignee from a lessee is entitled to claim as against the lessor apportionment of rent accruing due after the date of assignment to him up to the time of a transfer (if any) of his interest as assignee to a third person. The learned Judges pointed out, after referring to the statutory law and the common law of England, that in India there is no reason for not applying to rent the principle adopted in England in the case of interest. In *Vema Rangiah Chetty* v. *Vajravelu Mudaliar*[2], a decision of three judges, it was pointed out that though according to S. 2 (*d*) of the Transfer of Property Act, the Act does not apply to sales in execution, yet the principle of S. 36 of the Act which embodies a rule of justice, equity and good conscience can be applied and rent apportioned from day to day as between a lessor and the transferee of his right in execution in the course of a year of the lease. The decision in *Aparna Debi* v. *Sree Sree Shiba Prashad Singh*[3], in which the law of apportionment was allowed by the Patna High Court was a case of devolution of interest on succession. So also was the case in *Shivaprasad Singh* v. *Prayagkumari Debee*[4], where in an elaborate judgment, after referring to the English and the Indian cases already cited, the learned Judges came to the conclusion that though S. 36 of the Act would not apply to the case before them, yet on grounds of equity apportionment

1. (1912) 23 M.L.J. 695: I.L.R. 38 Mad. 86.
2. (1917) 33 M.L.J. 618: I.L.R. 41 Mad. 370.
3. (1924) I.L.R. 3 Pat. 367.
4. (1933) I.L.R. 61 Cal. 711.

Pandia Chinna Thambiar v. Veerappa Pandian.

Madhavan Nair, J.

might be allowed. In that case the question was "whether the plaintiffs (the widows) were entitled to rents and royalties which fell due during the lifetime of Raja Durga Prasad". The Raja died on the 7th March, 1916, before the year was out and rents and royalties had not then fallen due to him, and the decision turned upon the question whether such rents and royalties could be apportioned under the Act. The learned Judges held that the "plaintiffs are entitled to such rents and royalties due up to the date of the death of Raja Durga Prasad", that is to say, till the 7th March, 1916, and no distinction was made between agricultural tenancies and colliery leases both being treated on the same footing. In all these cases the principle underlying S. 36 of the Transfer of Property Act was applied on grounds of justice, equity and good conscience.

The Counsel for the appellant says that the above cases should now be held to have been wrongly decided in the light of the Privy Council decision in *Phirozshaw Bomanjee* v. *Bai Goolbai*[1]. In that case after stating that the English Apportionment Act of 1870 does not apply to India, nor do any of the earlier English Apportionment Acts, and that it is common ground that the principle which applied in that case was that of the original English law as it stood apart from statute, their Lordships observed as follows:—

> " The older English Law on the subject was stated by Lord Eldon in Ex parte *Smyth* and is amplified in the learned note appended to the report of that case by Mr. Swanston. The latter traces it to the two propositions, that an entire contract cannot be apportioned, and that under such an instrument as, for instance, a lease with a reservation of periodically payable rent, the contract for each portion is distinct and entire. The rule, however, while applicable to periodical payments becoming due at fixed intervals, did not apply to sums accruing *de die in diem*. It did not, for example, apply to annuities or to debts. The distinctions drawn were often fine. But it is not necessary for their Lordships to discuss them, because it is plain that, however clear the principle which governed the character of proprietary and contractual rights, it was always open to a testator or settlor, with full power of disposition, to exclude its practical consequences".

And then their Lordships began to consider:

> "whether there is not in the trust deed language which, by implication, imports that apportionment was directed by the settlor to take place."

The learned Judges in *Shivaprasad Singh* v. *Prayagkumari Debee*[2] distinguished the Privy Council case on the ground that what was decided in the case was a question of

1. (1923) 47 M.L.J. 79: L.R. 50 I.A. 276: I.L.R. 47 Bom. 790 (P.C.).
2. (1933) I.L.R. 61 Cal. 711.

Pandia Chinna Thambiar v. Veerappa Pandian.

Madhavan Nair, J.

intention as evidenced by a deed of settlement as to whether income derived from rents and shares was apportionable *de die in diem* though they felt the force of the admission made by the parties before their Lordships that the law of apportionment applicable to India was the old law in England. They were also of opinion that the old English law of non-apportionment was not applicable to the case before them which was not a case between persons standing in relation of lessor and lessee or of persons who were bound by covenants, relating to payment of rent at stated intervals. In the case before us also, it is hardly proper to describe, as already pointed out, the zamindar and the persons from whom the payments are due as persons standing in the position of lessor or lessee. Having regard to the special features of the case in the Privy Council we are not inclined to hold that the previous decisions of this Court which have been uniform should be considered to be overruled by that decision. Following those decisions and the decisions in *Shivaprasad Singh* v. *Prayagkumari Debee*[1] and *Aparna Debi* v. *Sree Sree Shiba Prashad Singh*[2], we hold that the principle of S. 36 of the Transfer of Property Act will apply to the present case on grounds of justice, equity and good conscience and that the decision of the lower Court is right. The appeal is dismissed with costs of Respondents 1, 2, 5 and 6.

S. V. V. —— *Appeal dismissed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VARADACHARIAR, MR. JUSTICE BURN AND MR. JUSTICE PANDRANG ROW.

Polparkara Manakkal Viroopakshan Nambudripad .. *Appellant** (*Plaintiff*)

v.

Pulipra Tarwad Karnavan and Manager Chembu Nayar (deceased) and others .. *Respondents* (*Defendants 1, 17, 18 and 11 and L. R. of 1st Defendant*).

F.B.

Viroopaksh v. Nambudripad v. Chembu Nayar.

Mortgage—Suit for redemption by melcharthdar—Decree conditional on payment of compensation—Failure to deposit—Application by jenmi for time

1. (1933) I.L.R. 61 Cal. 711. 2. (1924) I.L.R. 3 Pat. 367.

* S.A. No. 1416 of 1931. 11th November, 1936.

F.B.

Viroopakshan Nambudripad v. Chembu Nayar.

to deposit—Failure of jenmi also to deposit—Later suit by jenmi for redemption—If barred—Right of jenmi to sue during the pendency of the melcharth.

In a prior suit by a melcharthdar, a decree for possession was passed conditional on payment of a certain sum of money for compensation for the improvements effected by the tenant. The decree-holder did not care to deposit the amount and take possession. But the jenmi, under some impression as to his position, wanted to deposit the amount and actually applied for extension of time, which was twice granted but finally no money was deposited, as no further time was given. Later on the jenmi filed a suit for redemption of properties in the possession of the kanomdar. It was contended that the suit was not maintainable by virtue of the former suit.

Held, that this second suit by the jenmi is not barred. Merely because the jenmi was one of the defendants in the former suit by the melcharthdar for redemption of the kanom, he will not be barred from filing a second suit for redemption. The fact that he applied for extension of time to deposit will not put him in the position of a plaintiff and bring him within the principle of *Vedapuratt* v. *Vallabha Valiya Raja*, (1902) 12 M.L.J. 128: I.L.R. 25 Mad 300 (F.B.), so as to preclude him from maintaining a second suit.

Further even assuming that it brought him under the mischief of *Vedapuratti* v. *Vallabha Valiya Raja*, (1902) 12 M.L.J. 128: I.L.R. 25 Mad. 300 (F.B.), that decision must be deemed to be overruled by *Raghunath Singh* v. *Hansraj Kunwar*, (1934) 67 M.L.J. 813: L.R. 61 I.A. 362: I.L.R. 56 All. 561 (P.C.).

Quaere: How far *Nynam Veetil Mayan Kutti* v. *Valappilakath Kunhammad*, (1917) 34 M.L.J. 167: I.L.R. 41 Mad. 641, is also affected by *Raghunath Singh* v. *Hansraj Kunwar*, (1934) 67 M.L.J. 813: L.R. 61 I.A. 362: I.L.R. 56 All. 561 (P.C.), in so far as it is based not merely on *Vedapuratti* v. *Vallabha Valiya Raja*, (1902) 12 M.L.J. 128: I.L.R. 25 Mad. 300 (F.B.), but also on the special provisions of the Malabar Compensation for Tenants Improvements Acts.

As the melcharthdar has precluded himself from recovering possession in pursuance of his decree, the jenmi is entitled to maintain the suit, even during the period of the melcharth.

Raman Nambudri v. *Achutha Pishurodi*, (1904) I.L.R. 35 Mad. 42, approved.

Appeal against the decree of the Court of the Subordinate Judge of Ottapalam in A. S. No. 136 of 1929 (A. S. No. 342 of 1929 District South Malabar) preferred against the decree of the Court of the District Munsiff of Ponnani in O. S. No. 677 of 1927.

K. Kuttikrishna Menon for Appellant.

K. P. Raman Menon for Respondents.

The judgment of the Court was delivered by

Varadachariar, J.

Varadachariar, J.—This case has been posted before this Bench in consequence of a contention raised on behalf of the appellant that the decision of the Full Bench in *Vedapuratti* v. *Vellabha Valiya Raja*[1], should not be followed after the decision

6. (1902) 12 M.L.J. 128: I.L.R. 25 Mad. 300 (F.B.).

F.B.

Viroopakshan Nambudripad *v.* Chembu Nayar.

Varadachariar, J.

of the Privy Council in *Raghunath Singh* v. *Hansraj Kunwar*[1]. The second appeal arises out of a suit instituted by a jenmi for redemption of properties in the possession of the kanomdar. Various objections were raised of which it is necessary to refer only to those raised by issues 1 and 3.

The third issue was framed with reference to what happened in O. S. No. 670 of 1923 on the file of the Ponnani Munsiff's Court. That suit was instituted by the assignee of a melcharthdar, who is the seventeenth defendant in the present suit. A decree for possession was passed in that suit conditional on payment of a certain sum of money for compensation for the improvements effected by the tenant. The decree-holder, however, did not care to deposit the amount and take possession. Some months after the date of the decree, he sent a registered notice to the jenmi, which has been marked Ex. VI in the present case, wherein he stated that the suit had been instituted by him really at the instance of the jenmi and he accordingly called upon the jenmi to take steps to deposit the compensation amount and recover possession. We are not in a position to say if and how far the allegations in Ex. VI are true. It is, however, in evidence that the jenmi made two or three applications for extension of time to deposit the compensation amount, as he was under the impression that if he did not do so, his right might once for all be extinguished. On two occasions extension seems to have been granted, but on the third occasion his application for further extension of time was rejected by order dated 7th September, 1925.

No reasons have been stated for the rejection. It has been contended in the Courts below and before us, on behalf of the kanomdars, that these proceedings taken in O. S. No. 670 of 1923 operate as a bar to the present suit on two grounds: (1) on the general principles laid down by a Full Bench of this Court in *Vedapuratti* v. *Vallabha Valiya Raja*[2], (2) in view of the special provisions in the Malabar Compensation for Tenants Improvements Act.

It has not been disputed that in the ordinary course the jenmi will not be precluded from instituting a suit merely because he was one of the defendants in a former suit, instituted by the melkanomdar for redemption of the kanom.

1. (1934) 67 M.L.J. 813: L.R. 61 I.A. 362: I.L.R. 56 All. 561 (P.C.).
2. (1902) 12 M.L.J. 128: I.L.R. 25 Mad. 300 (F.B.).

F.B.

Viroopakshan Nambudripad v. Chembu Nayar.

Varadachariar, J.

The Courts below recognise that the decisions in *Raman Nambudri* v. *Achutha Pishurodi*[1] and *Veerappudayan* v. *Muthukaruppa Thevan*[2] are against any such contention. But it has been argued that because the present plaintiff applied to the Court in O. S. No. 670 of 1923 for extension of time to pay the money and extension was granted on two occasions, he must be held to have put himself in the position of the plaintiff in that suit and therefore to be governed by the principle laid down in *Nynam Veetil Mayan Kutti* v. *Valappilakath Kunhammad*[3] and that if he allowed his remedy by way of execution to become barred, he would not be entitled to bring a second suit. The decision in *Nynam Veetil Mayan Kutti* v. *Valappilakath Kunhammad*[3] was based upon the principle of *Vedapuratti* v. *Vallabha Valiya Raja*[4] and on that ground dissented from the earlier decision in *Chowakkaran Keloth* v. *Karuvalote Parkum*[5].

We are unable to agree with the contention that merely because the jenmi applied for extension of time in O. S. No. 670 of 1923, he must be precluded from maintaining a second suit. It does not appear from the record that his right to execute the decree in O. S. No. 670 of 1923 was adjudicated upon by the Court. The mere fact that he expected that if he deposited the money he might be able to take possession, will not by itself suffice to create in him a disability which would not otherwise arise under the law. Nor do we think that the statements made in Ex. VI by the plaintiff in O. S. No. 670 of 1923 can operate as a legal assignment to the jenmi of the decree obtained by the plaintiff in O. S. No. 670 of 1923. It has not been contended—and Ex. VI cannot be regarded as evidence—that the melcharth itself was a benami transaction and that the jenmi was in substance and truth the plaintiff in the former litigation.

As regards the objections based upon the principle of *Vedapuratti* v. *Vallabha Valiya Raja*[4] that even assuming that after a decree for redemption the relationship of mortgagor and mortgagee continues, a *second* suit for redemption will nevertheless not lie, it seems to us that that view can no

1. (1904) I.L.R. 35 Mad. 42. 2. (1913) 24 M.L.J. 534.
3. (1917) 34 M.L.J. 167: I.L.R. 41 Mad. 641.
4. (1902) 12 M.L.J. 128: I.L.R. 25 Mad. 300 (F.B.).
5. (1914) 29 I.C. 559.

F.B.

Viroopakshan Nambudripad *v.* Chembu Nayar.

Varadachariar, J.

longer be maintained in the face of the decision of the Privy Council in *Raghunath Singh* v. *Hansraj Kunwar*[1]. Their Lordships point out that unless as contemplated by S. 60 of the Transfer of Property Act the right of redemption has been extinguished in one of the modes contemplated by the statute, the mere fact, that a decree for redemption obtained on a former occasion has not been executed, will not prevent the mortgagor fom maintaining a subsequent suit for redemption. The judgments in *Vedapuratti* v. *Vallabha Valiya Raja*[2], themselves refer to the conflict of judicial opinion on the point that existed prior thereto and the view now laid down by their Lordships of the Judicial Committee seems rather to approve of the opinion which the Full Bench overruled in *Vedapuratti Vallabha Valiya Raja*[2]. We are unable to agree with the contention of the learned Counsel for the respondents that because *Vedapuratti* v. *Vallabha Valiya Raja*[2] has not been in terms overruled by their Lordships, it must still be taken to be good law. So far as we can gather from the report the Full Bench decision seems to have been cited before their Lordships. In any event the way their Lordships stated the points for consideration clearly indicates that the ground of *res judicata* on which the Full Bench rested their conclusion was intended to be dealt with by their Lordships. At the top of page 567 they observe:

> "If the appellants fail to establish under their third point that the old decree extinguished the right to redeem, there is, in their Lordships' opinion no ground for saying that the old decree operated by way of *res judicata* so as to prevent the Courts under S. 11 of the Code of Civil Procedure from trying the present suit".

After this expression of opinion by their Lordships, it is not possible to maintain that the ground of decision adopted by the Full Bench in *Vedapuratti* v. *Vallabha Valiya Raja*[2] is any longer available. The other ground suggested in *Vedapuratti* v. *Vallabha Valiya Raja*[2], *viz.*, the bar by *lis pendens* will not avail when by reason of the bar of limitation or from other causes relief can no longer be had by proceedings taken in the former suit.

So far as the decision in *Nynam Veetil Mayan Kutti* v. *Valappilakath Kunhammad*[3] is based not merely on the principle of *Vedapuratti* v. *Vallabha Valiya Raja*[2] but upon the special provisions of the Malabar Compensation for Tenants Improve-

1. (1934) 67 M.L.J. 813: L.R. 61 I.A. 362: I.L.R. 56 All. 561 (P.C.).
2. (1902) 12 M.L.J. 128: I.L.R. 25 Mad. 300 (F.B.).
3. (1917) 34 M.L.J. 167: I.L.R. 41 Mad. 641.

F.B.

Viroopakshan Nambudripad *v.* Chembu Nayar.

Varadachariar, J.

ments Act which do not contemplate a preliminary decree and a final decree and which contain indications in S. 6 that the right conferred by the decree should be worked out only by proceedings in execution, it may be a question how far that view can be maintained after the judgment in *Raghunath Singh* v. *Hansraj Kunwar*[1], but it is not necessary for us to decide that point in this case because, as we have already observed, the present plaintiff was not the plaintiff in the former suit and cannot therefore be held to be precluded from maintaining the present suit.

As regards the objection raised by the first issue, namely, that during the period of the melcharth the plaintiff has no *right* to maintain the present suit, there are two answers to it, (1) that even that period has expired during the pendency of the appeal and (2) apart from that, on the principle recognised in *Raman Nambudri* v. *Achutha Pishurodi*[2], the jenmi will be entitled to maintain the present suit, because the melcharthdar has precluded himself from recovering possession in pursuance of that decree.

The result is that the second appeal is allowed and the decree of the District Munsiff restored with costs here and in the Lower Appellate Court.

S. V. V. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BURN.

K. Sivasankara Mudaliar and others .. *Appellants* (Defendants)*

v.

R. Krishnaswamy Mudaliar.. *Respondent (Plaintiff).*

Sivasankara Mudaliar *v.* Krishnaswamy Mudaliar.

Madras Estates Land Act (I of 1908)—Three undivided brothers owning the estate—Tender of patta by the manager alone—Manager not recognised or registered as landholder—If valid.

Where an estate is owned by three undivided Hindu brothers, a tender of a patta by only one of them, though he be the eldest and the managing member, is invalid, unless he has been recognised or registered by the Collector as a landholder under S. 3, Cl. (5) of the Estates Land Act.

Venugopala Rao v. *Venkatrayudu*, (1911) 10 M.L.T. 450, followed.

Appeal against the decree of the District Court of Salem in A. S. No. 174 of 1932 preferred against the decree of the Court of the Deputy Collector of Salem Division in Summary Suit No. 3 of 1932.

1. (1934) 67 M.L.J. 813: L.R. 61 I.A. 362: I.L R. 56 All. 561 (P.C.).
2. (1904) I.L.R. 35 Mad. 42.

* S. A. No. 772 of 1933. 29th October, 1936.

Sivasankara Mudaliar v. Krishnaswamy Mudaliar.

K. S. Sundaram for Appellants.

D. Ramaswami Aiyangar for Respondent.

The Court delivered the following

JUDGMENT.—The decision of the learned District Judge is supported by the case reported in *Venugopala Rao* v. *Venkatrayudu*[1] to which he refers. The cases reported in *Ayyappa* v. *Venkatakrishnama Razu*[2] and *Parthasarathi Ayyangar* v. *Rangaswami Ayyangar*[3] are cases in which a single landholder had been recognised by the Collector as landholder, and therefore they do not apply to this case. Here it is clear that all the three brothers are landholders and though the appellant is the eldest brother and the managing member of the joint family of which all three are members, he has not been recognised or registered by the Collector under S. 3 (5) of the Estates Land Act, simply because there has been no dispute between himself and his brothers. We have here three co-equal "landholders" of whom only one tendered the patta in this case. Such a tender, I agree with the learned District Judge, is invalid. This appeal is dismissed with costs.

Leave to appeal is refused.

S. V. V. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATARAMANA RAO.

Sadasivam Pillai and others .. *Petitioners** (*Appellants 2 to 4*)

v.

Varadaraja Odayar and others .. *Respondents* (*Respondents*).

Sadasivam Pillai v. Varadaraja Odayar.

Court-Fees Act (VII of 1870), S. 12, cls. 1 and 2—Judge first holding court-fee paid was sufficient—If can revise the order afterwards—Revision to High Court against the later order—High Court, if can then act under S. 12, cl. (2).

Where a Court once passed a considered order that the court-fee paid on a memorandum of appeal presented before it was correct, that Court has no power to afterwards revise the order.

Lakshmana Aiyar v. *Palaniappa Chettiar*, (1935) 69 M.L.J. 479, followed and applied.

In a revision filed against the order revising the first order, the High Court cannot act under S. 12, cl. (2) of the Court-Fees Act. Only an *inter-*

1. (1911) 10 M.L.T. 450.
2. (1892) 2 M.L.J. 219: I.L.R. 15 Mad. 484.
3. (1916) 4 L.W. 654.

* C. R. P. No. 745 of 1936. 28th October, 1936.

Sadasivam Pillai *v.* Varadaraja Odayar.

locutory order in the appeal is then before the High Court and not the *subject-matter* of the appeal and it is a condition precedent to the exercise of powers under cl. (2) of S. 12 that the subject-matter of the suit or appeal must be before the "Court of appeal, reference or revision".

Quaere: whether the whole subject-matter should be before the Court of appeal, reference or revision, or it is enough if only part of the subject-matter is before it.

Petition under Ss. 115 of Act V of 1908 and 107 of the Government of India Act praying the High Court to revise the order of the Court of the Subordinate Judge of Kumbakonam dated 6th March, 1936, and made in A. S. No. 92 of 1935.

K. S. Desikan for Petitioners.

G. Jagadisa Aiyar for Respondents.

The Court delivered the following

JUDGMENT.—This is a petition to revise the order of the learned Subordinate Judge of Kumbakonam dated 6th March, 1936, directing the 3rd defendant to pay an additional court-fee of Rs. 134-15-0 on his memorandum of appeal presented against the judgment and decree of the District Munsif of Kumbakonam in O. S. No. 323 of 1933 on the file of the said Court. This order was in supersession of the prior order passed by the same learned Judge on the 20th November, 1935, in and by which he had decided that the correct court-fee had been paid. The question is, has the learned Judge jurisdiction to pass the order under revision? In a recent case reported in *Lakshmana Aiyar* v. *Palaniappa Chettiar*[1], Venkatasubba Rao, J., in a considered judgment held that once on an objection taken by the office or by a defendant, a Court applies its mind and gives its considered decision, it is final and its power to revise the valuation is at an end. No other interpretation is possible on the language of S. 12, cl. 1 of the Court-Fees Act. I respectfully agree with the said decision and set aside the order in question.

But I am invited by Mr. Jagadisa Aiyar to go into the correctness of the said order and uphold it under S. 12, cl. 2 of the said Act. Granting that the order is correct, I do not think I should be justified in upholding it on this ground as I would be striking at the principle of finality laid down by cl. 1 of the section. And I would also be setting up a bad precedent by encouraging parties and Courts to go behind

1. (1935) 69 M.L.J. 479.

Sadasivam Pillai v. Varadaraja Odayar.

orders once passed and indirectly circumvent what is prohibited by the section. Unless compelled to do so, I should like to avoid a construction of cl. 2 of the section which would lead to such a result. In my opinion, the condition precedent to the exercise of powers under cl. 2 is that the suit, *i.e.*, the subject-matter of the suit should be before the Court of appeal, reference or revision. It is unnecessary for me to consider in this case whether it should be the whole subject-matter as *Kerala Varma* v. *Chadayan Kutti*[1] seems to suggest or if part of the subject-matter is enough as observed by the learned Judges of the Calcutta High Court in *Radharanee* v. *Kshetra Mohan*[2], but the suit whether whole or in part must be before the Court of appeal or revision. Were it otherwise, it may be contended that whenever there is an appeal or revision against an interlocutory order in the suit (for instance, an order upon an application for injunction or attachment before judgment) the Court of appeal or revision can go into the question of court-fee paid in the lower Court if it is brought to its notice that the proper court-fee had not been paid. Such a result would never have been in the contemplation of the legislature. As the suit is not before me, I do not feel warranted in exercising my powers under cl. 2 of S. 12 and I express no opinion as to the correctness or otherwise of the order which is set aside.

In the result, the revision petition is allowed with costs.

S. V. V. —— *Petition allowed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT:—MR. JUSTICE VARADACHARIAR, MR. JUSTICE BURN AND MR. JUSTICE PANDRANG ROW.

F.B. Rajah of Vizianagaram v. China Thammanna

The Rajah of Vizianagaram represented by his next friend, the Estate Collector appointed under the Court of Wards Act .. *Petitioner* in all (Plaintiff)*

v.

Dindi China Thammanna and others .. *Respondents (Defendants).*

Madras Local Boards Act (XIV of 1920), S. 88—First proviso—If applies to pre-settlement inams—"Intermediate landholder"—Pre-settlement inamdar

1. (1891) I.L.R. 15 Mad. 181. 2. (1935) 40 C.W.N. 406.

*C. R. P. Nos. 1063 to 1070 of 1933. 16th November, 1936.

F.B.

Rajah of Vizianagaram *v.* China Thammanna

in occupation of land—If and when can be one—Zemindar's suit against inamdar to recover cess paid to Government—Limitation—Art. 120 of the Limitation Act applicable.

Though in actual occupation of the land, the landholder of a pre-settlement inam can be, within the meaning of S. 88 of the Madras Local Boards Act, an "intermediate landholder" from whom the zemindar can claim to recover the whole or any portion of the cess paid by him to Government and the decisive fact in deciding the question whether the inamdar is or is not an intermediate landholder is not whether the inam is a pre-settlement inam or a post-settlement inam but whether the lands have been excluded from or included in the assets of the zemindari when the Permanent Settlement was made. If the inam lands have not been included in the assets, the inamdar is himself treated as the landholder holding directly under the Government but if the assets include the inam lands as well, then the zemindar is treated as the landholder and cess is collected from him by the Government, leaving him to reimburse himself from the inamdar treating him as an intermediate landholder.

It is not necessary for an inam to come under the first proviso to S. 88 that payment of kattubadi, jodi, poruppu or quit-rent should be provided for in respect of that inam, nor are the words "under-tenure created, continued or recognised by a landholder" in that proviso to be limited to post-settlement grants alone.

A suit by a zemindar to recover the whole or any portion of the cess paid by him to the Government from the inamdar is a suit to enforce a liability created by statute and as such is governed by Art. 120 of the Limitation Act. It is not a suit for rent nor one based on any contract express or implied.

Petition under S. 25 of Act IX of 1887, praying the High Court to revise the decrees of the Court of the District Munsiff of Vizagapatam in Small Cause Suits Nos. 1373, 1372, 1378, 1370, 1371, 1376, 1375 and 1374 of 1932 respectively.

S. Venkatesa Aiyangar for Petitioner.

G. Lakshmanna for Respondents.

The judgment of the Court was delivered by

Varadachariar, J.

Varadachariar, J.—The point arising for decision in these petitions is whether the holder of a pre-settlement inam in a zamindari can under any, and, if so, what circumstances be dealt with as an "intermediate landholder" from whom the zamindar can claim to recover the whole or a portion of the cess paid by the zamindar to Government under S. 88 of the Madras Local Boards Act.

So far as we are able to gather from the materials now before us, the inam to which these petitions relate seems to have been granted long prior to the permanent settlement and in some of the reports filed in the case the purpose of the inam is described as "*Veeti Koluvu*". This expression has not been

very much elucidated either by the translation adopted by the District Munsif. We prefer to leave it in the vernacular form so that the matter may be better investigated by the lower Court to which we are remanding these cases. It appears from the evidence—and on that circumstance one of the chief contentions raised by the defendants in the lower Court was based—the holders of these inams are in actual occupation of the land. It was accordingly contended that they cannot be regarded as intermediate landholders within the meaning of S. 88. It has been held in *Bhupathi Raju* v. *Subba Rao*[1] that the possession of the land itself by the inamdar does not preclude his being an intermediate landholder within the meaning of S. 88 because the first proviso to that section contemplates cases where the intermediate landholder may or may not have a right of occupancy. In *Bhupathi Raju* v. *Subba Rao*[1] the inamdar no doubt held a *darimilla* or post-settlement inam: but it does not appear to us that the decisive fact is whether the inam is a pre-settlement inam or post-settlement inam but whether even in the case of a pre-settlement inam the lands have been excluded from or included in the assets of the zamindari when the permanent settlement was made. The scheme of the Local Boards Act is that when the inam lands have not been included in the assets of the zamidari the inamdar is himself a landholder holding directly under the Government. But if the assets include the inam lands as well, he has no direct relation with the Government but the Government collects the cess from the landholder and the landholder reimburses himself from the inamdar treating him as an intermediate landholder.

In the plaint as originally filed the suit inam was described as *darimilla* inam but the written statement pointed out that the inam had been granted long before the permanent settlement. The plaint apparently made a mistake on account of the way in which the estate accounts have referred to this inam. Sometime after the written statement was filed and the mistake was pointed out, an application was filed on behalf of the plaintiff to amend the plaint (Interlocutory Application No. 291 of 1933) and similar applications in the rest of the batch, but the District Munsif dismissed it. We do not think that in the circumstances the amendment petition really attempted to change the cause of action. We accordingly

1. (1931) 62 M.L.J. 472: I.L.R. 55 Mad. 646.

F.B.

Rajah of Vizianagaram v. China Thammanna

Varadachariar, J.

allow the amendment to be made as prayed for but in the circumstances we also think it right to allow an opportunity to the defendants to raise any additional pleas that they may think fit to raise with reference to the plaint thus amended. The lower Court will then decide the question whether or not the suit inam lands had been excluded from the permanent settlement. There is an observation in the District Munsif's judgment that the Freese Report shows that they have been excluded. From the portion now made available to us we do not think that it is so. Mr. Lakshmanna, the learned Counsel for the respondent, has not been able to draw our attention to any such portion in the report. That observation of the District Munsif will accordingly be ignored and the question tried afresh.

Mr. Lakshmanna suggested that there is some lacuna in S. 88 of the Local Boards Act and that pre-settlement inams even if they had been included in the assets should not be held to be covered by the expression "under-tenure created, continued or recognised by a landholder," in the first proviso to S. 88 because, according to him, those three words must be held to refer only to post-settlement grants. It does not appear to us that these words are in their natural meaning so limited nor have we been shown any reason why, having regard to the policy of the permanent settlement and the scheme of the Local Boards Act, such pre-settlement inams should be excluded from assessment or the zamindar be made to pay the whole cess in respect thereof.

A further point was made by Mr. Lakshmanna that it is only when payment of kattubadi, jodi, poruppu or quit-rent is provided for in respect of any inam that it will come under that proviso. We do not think that it is the proper construction. All that the proviso enacts is that where kattubadi, jodi, poruppu or quit-rent is in fact paid, one half of the cess calculated with reference to such payment shall be deducted and the balance will be the amount which the landholder is entitled to recover from the intermediate landholder. Where no such payment is made, the landholder will be entitled to recover the cess from the intermediate landholder without any such deduction.

The other question dealt with in the judgment of the District Munsif is one of limitation. He has held the suits to

F.B.

Rajah of Vizianagaram v. Chinna Thammanna

Varadachariar, J.

be barred in respect of certain items on the footing that such a suit is governed by the three years' rule of limitation. We see no warrant for applying the three years' rule. The suit is not one for rent nor is it based on any contract express or implied. It is to enforce a liability created by statute. In such a case the course of decisions in this presidency has been to the effect that the suit will be governed by Art. 120. In this view no portion of the suit claim will be barred by limitation.

The plaintiff claims interest on the amount sued for. We see no basis on which the plaintiff can claim interest prior to the date of the plaint. The plaintiff will only be entitled to interest at six per cent. per annum (on such amount as may be decreed in his favour) from and after the date of the plaint.

The decrees of the Court below are set aside and the cases sent back for retrial in the light of the above observations. In the circumstances there will be no order as to costs in these Civil Revision Petitions. Costs in the lower Court will be provided for in the revised decrees.

S.V.V. *Revision allowed and case remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATASUBBA RAO AND MR. JUSTICE VENKATARAMANA RAO.

Manickam Chetty .. *Appellant** (*1st Defendant*)

v.

Kamalam *alias* Kamalathammal. *Respondent* (*Plaintiff*).

Manickam Chetty v. Kamalam.

Hindu Law—Partition—Division of some items leaving the rest joint—If joint family status continues re *undivided items—Presumption of complete partition and intention to partition—Deed unambiguous—Extrinsic evidence inadmissible to construe the same—Business carried on by one member with joint family funds—Nature of—Whether individual concern or of joint family.*

Where three undivided brothers *A*, *B* and *C* entered into a partition arrangement dividing in detail all the family properties and in the main separate allotments were made to each individual sharer but some of the outstandings were jointly allotted to *B* and *C*.

Held, that there can be a separation in respect of some assets of a joint family, at the same time, retaining the joint status with regard to the other items not divided but the burden is on those who assert, that notwithstanding a partition complete in its details the partition was not intended to be acted upon, to prove it. Where the intention to divide is manifest and the facts proved are consistent either with a state of division, or of non-division, no Court ought to hesitate to prefer that, which accords with that intention.

---

* Appeal No. 70 of 1934. 22nd October, 1936.

Manickam Chetty v. Kamalam.

Where a partition deed is plain, unequivocal and unambiguous, extrinsic evidence of either the contemporaneous or the subsequent acts of the parties cannot be received to construe the document.

Where before partition a business is carried on by one member with the aid of joint family funds, it may be that the concern belongs to that individual member, his share being debited with the sums employed therefor; but the presumption from that circumstance is that it is a joint family concern.

Appeal against the decree of the Court of the Subordinate Judge of Kumbakonam in O. S. No. 33 of 1931.

S. Srinivasa Aiyangar and *N. R. Govindachari* for Appellant.

T. R. Venkatarama Sastriar, A. Ganesa Aiyar, M. S. Venkatarama Aiyar and *T. V. Rajagopalan* for Respondent.

The judgment of the Court was delivered by

Venkatasubba Rao, J.

Venkatasubba Rao, J.—The suit has been brought on the allegation that the plaintiff's deceased husband and the first defendant became divided and that the plaintiff is therefore entitled to her husband's share. It is also alleged that subsequent to the division the two brothers carried on business in partnership and the plaintiff on that footing claims an account of the partnership business. These mainly are the reliefs that the plaintiff has prayed for and the learned Subordinate Judge has found on these two points that the plaintiff's claim has been made out.

The facts may be briefly stated. There were three brothers: Annamalai, Arunachala, the plaintiff's husband and Manicka, the first defendant. They entered into a partition arrangement embodied in Ex. A, which covers 40 pages in print: That is a very elaborate document and the items allotted to each of the three individuals have been set out in great detail. Hence lands, outstandings, jewels, and all descriptions of property have been partitioned and adjustments have been made to equalise shares. The point, however, that has given rise to some controversy is that so far as certain outstandings amounting to Rs. 80,000 odd were concerned, they were jointly allotted to Arunachala and Manicka: as regards the other assets of the family, there has been in the main a separate allotment made to each of the three individual sharers. Subsequent to the partition, Arunachala and Manicka, carried on a joint trade (to use a neutral expression) treating the outstandings jointly allotted to them as pertaining to it. It may be mentioned that the partition to which we have adverted

Manickam Chetty v. Kamalam, — Venkatasubba Rao, J.

commenced on the 13th January, 1926, and was completed on the 25th February, 1928. Nevertheless the main items having been partitioned in the early part of 1926, the parties regarded themselves thenceforward as having become severed. The joint trade carried on by Arunachala and Manicka after the partition continued till the death of the former on the 16th February, 1929. The present action was commenced on the 5th April, 1929, *i.e.*, within a few weeks after his death.

In the lower Court it was contended that the intention was merely to separate Annamalai from the family and that with a view to effect his separation, the shares of the three brothers were defined and elaborate calculations were made. This contention is opposed to the very clear and unambiguous recitals of Ex. A and does not require serious notice.

The argument pressed upon us here is, that although as between Arunachala and Manicka there was a separation in respect of the other assets of the family, they must be treated as having retained their joint status in regard to the outstandings jointly allotted to them. That such a result can be brought about, there can be no question: but the point to decide is, is that the effect of the document? In *Ramalinga* v. *Narayana*[1], their Lordships of the Judicial Committee, after referring to *Appovier* v. *Ramasubba Aiyan*[2], point out that the character of undivided property may be taken away from some part of the estate, whilst as regards the rest the members may retain their joint status (*see* the case as reported in *Ramalinga* v. *Narayana*[3]). The question is therefore essentially one of construction of Ex. A. Does it lend any support to the contention that the outstandings allotted to Arunachala and Manicka jointly, were intended to retain the character of undivided property? As already stated, in other respects the division was complete and thorough. In regard to the houses, lands, jewellery, and other movables, there was a separate allotment to each of the three individual sharers. Some outstandings were allotted separately to Annamalai. Then as regards the outstandings jointly allotted to Arunachala and Manicka, there is a clear recital that they were to be divided in equal shares between them. This recital is very important

1. (1921) 43 M.L.J. 428: L.R. 49 I.A. 168: I.L.R. 45 Mad. 489 (P.C.).
2. (1866) 11 M.I.A. 75.
3. A.I.R. 1922 P.C. 201 at 205.

Manickam Chetty v. Kamalam.

Venkatasubba Rao, J.

and shows that the contention put forward cannot prevail. It will be convenient to set out here the result of a certain arrangement made between the parties. So far as the items exclusive of the outstandings were concerned, those allotted to the share of Annamalai were of the value of about Rs. 44,000; similarly, the total value of those allotted separately to the other two brothers was about Rs. 26,000, the difference between the two figures being about Rs. 18,000. To equalise the shares, Annamalai was directed to pay Rs. 10,920 odd to Arunachala and Rs. 7,200 odd to Manicka, these two sums aggregating to the Rs. 18,000 odd mentioned above. Pausing here for a moment, what does this arrangement show? The sums to be paid were unequal and were determined with reference to the other allotment made. This, far from showing that Arunachala and Manicka intended to remain joint, shows quite the opposite. Then follows the recital already adverted to which clinches the matter. Referring to the Rs. 80,000 odd outstandings, the document goes on to say (as mentioned above) that they shall be collected and divided between the two brothers. In the face of this it is difficult to follow the contention, that the outstandings jointly allotted, were to remain in joint enjoyment and retain the character of undivided property. Moreover, the unambiguous declaration at the end of the document that the three brothers divided the entire estate including the outstandings, is inconsistent with the theory put forward. It is unnecessary to pursue the matter further, as the learned Subordinate Judge has dealt with the question very fully and with his conclusion we are in entire agreement.

Mr. S. Srinivasa Ayyangar for the appellant contends that Ex. A is ambiguous and should be construed in the light of the acts of Arunachala and Manicka, both contemporaneous and subsequent. But, in our opinion, the instrument is plain and unequivocal and it is well settled that where there is no ambiguity, extrinsic evidence cannot be received. We may in this connection refer to *Babu* alias *Govinddoss Krishnadoss* v. *Gokuldoss Govardhandoss*[1], where the question has been fully considered. (See also *Babu* v. *Official Assignee, Madras*[2], where this case has been approved.)

---

1. (1928) 55 M.L.J. 132.
2. (1934) 67 M.L.J. 167: L.R. 61 I.A. 257: I.L.R. 57 Mad. 931 (P.C.).

Manickam Chetty v. Kamalam.

Venkatasubba Rao, J.

We have just mentioned that the learned Subordinate Judge has found that subsequent to the partition the two brothers transacted business in co-partnership. But the first defendant contends that it was in their character as members of a Hindu coparcenary that they carried on the dealings. The outstandings having been jointly allotted to them, they were brought into the common business. The rents from the immovable properties, to whomsoever they had been allotted, were indifferently credited in the common accounts, that is to say, the credits were not made individually in the name of Arunachala or Manicka; it was the tenants that were credited with the amounts paid. From these, we are asked to infer that the partition evidenced by Ex. A was not given effect to so far as these two brothers were concerned. But, there is other evidence which shows, that each brother was treated as having his own individual dealings. Arunachala purchased a property and the sale-deed was taken in his name; the amounts paid as the sale price were debited against him separately. As regards the household expenses, the matter stands thus: Arunachala was at Kumbakonam and the expenses incurred there were carried to a separate page; similarly, the expenses incurred by Manicka at Aduthurai where he was living, were separately entered. Within a few days of the death of Arunachala, Manicka had to file some suits for the recovery of certain amounts due to the joint business and in the plaints (Exhibits R and S) he averred most distinctly that he and his deceased brother were partners and the amounts became due to the partnership. The crediting of the rents in the account books without indicating to which of the two brothers they belonged, does not possess much significance. No one could tell what adjustments might have been made, had the partition accounts been settled, but the partnership was of a short duration as it came to an end by Arunachala's death. The learned Judge has rightly held that from this and similar conduct no adverse inference can be drawn. There is a heavy burden which Manicka had to discharge as his attempt was to show that the partition so complete in its details was not intended to be acted upon. In such a case what is the rule of evidence to be applied? Supposing the facts proved are consistent either with a state of division, or non-division, no Court ought to lightly infer from equivocal facts that the parties intended to revoke, as it were, the partition which had been solemnly entered into; in other words the

Manickam Chetty v. Kamalam, Venkatasubba Rao, J.

intention to divide being manifest, even if the subsequent conduct is susceptible of two interpretations, no Court ought to hesitate to prefer that, which accords with that intention. The alternative theory put forward that the divided brothers should be regarded as having become re-united, is equally untenable. Re-union, being of "very rare occurrence", requires, when alleged, strict proof (*Palani Ammal* v. *Muthuvenkatachala Moniagar*[1]), and from what has been said, it will be apparent, that there is not a shred of evidence in support of the alleged re-union.

It has been suggested that Exhibit A requires registration as the immovable properties have been divided by metes and bounds. That would depend upon the nature and effect of Ex. A, *i.e.*, was it intended to be the operative deed by which the partition was brought about or to serve merely as a record of an already completed partition? It is unnecessary to go into this matter, for, in any event the document, as has been conceded can be received in evidence to prove that there was a division in status and the question is of no importance, as the appellant, as his learned counsel has stated, has no desire to impugn the mode of division adopted at the partition that has been entered into.

Then we pass on to the pledge business, regarding which there has been a good deal of argument. The first question that arises is, was it a joint family concern before the partition. There is no doubt that the business had been carried on with the aid of joint family funds, and that circumstance would *prima facie* make it a joint family concern. When coparcenary funds are employed there may be one of two intentions, either that the concern belongs to an individual member, his share being debited with the sums employed or what is more natural —that the concern was carried on for the joint benefit. However as stated above, in the absence of evidence to the contrary, the business will be presumed to belong to the entire coparcenary; but here the facts furnish positive evidence which shows that the pledge dealings were not treated as a joint family business. The brothers divided at the partition not the business itself but the sums left outstanding in it. It is difficult to say that there was one business or two businesses, but that is immaterial; the point to note is, that there was a distinct

1. (1924) 48 M.L.J. 83: L.R. 52 I.A. 83 at 86: I.L.R. 48 Mad. 254 (P.C.).

Manickam Chetty v. Kamalam.

Venkatasubba Rao, J.

recognition at the partition by the brothers that the business in question was not a coparcenary concern and that it was on that footing they excluded it from the division. If this is borne in mind, the evidence adduced in the case presents no difficulty. There are two sums at page 222 of the printed book Rs. 5,100 odd standing against the name of Arunachala and Rs. 2,300 odd against the name of Manicka. These are significant entries and coupled with the admission of Manicka at page 495, they lead to the inference that the pledge business at Kumbakonam belongs to Arunachala and that at Aduthurai to Manicka. This matter has been fully gone into by the Subordinate Judge and no reason has been shown why we should dissent from his conclusion. So far as the oral evidence of the first defendant is concerned no Court will be disposed to treat it as worthy of belief, as his conduct has been utterly dishonest as shown by the learned Judge in paragraphs 35 and 40 of his judgment.

* * * *

In the result the appeal is dismissed with costs.

S. V. V. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Panchayat Board, Sivaganga by its President .. *Petitioner* in Crl. R. C. No. 869 of 1935 and Respondent in Crl. R. C. No. 129 of 1936 (Complainant)*

v.

T. Pillathian Servai .. *Respondent in Crl. R. C. No. 869 of 1935 and Petitioner in Crl. R. C. No. 129 of 1936.*

Panchayat Board, Sivaganga v. Pillathian Servai.

Madras Local Boards Act (XIV of 1920), S. 222 and Sch. IV, Rr. 25, 32 and 33—Preparing list of tax-payers—Individual notices if necessary—Non-payment of tax—Prosecution launched by Panchayat Board—Time-limit—Distraint becoming impracticable—Removal of movables by assessee—Expiry of period of limitation for prosecution.

R. 25 of Sch. IV of the Madras Local Boards Act seems to contemplate the preparation of a list every year, showing the persons who have to pay taxes and the amount due by each of them. It is not however necessary for the President to prepare an entirely fresh list every half year. He can adopt the old one with such amendments as may be necessary, subject only to the

*Crl. R. C. Nos. 869 of 1935 and 129 of 1936. 16th November, 1936.
Crl. R. P. Nos. 799 of 1935 and 120 of 1936.

Panchayat Board, Sivaganga *v.* Pillathian Servai.

condition that he must prepare a completely fresh list once in every five years. In the preparation of the annual list the rule only requires that public notice of the amendments made in the list is necessary. Individual notice is necessary only when the President of the Panchayat Board makes an alteration in the assessment at some time other than the occasion on which he prepares the half-yearly list.

Under S. 222 of the Madras Local Boards Act the prosecution must be launched within three years from the date on which the prosecution might first have been commenced; and reading that section with Rr. 32 and 33 of Sch. IV of the Act the prosecution must be launched within three years of the date on which distraint becomes impracticable. Where the impracticability of distraint is alleged to have arisen because the accused removed his movables from his house, it is from the date of his doing so that the distraint may be said to have become impracticable. In the absence of proof that the accused removed the movables at a later date the Court may presume that distraint became impracticable on the very day on which the Panchayat Board is authorised by R. 33 to distrain property, that is, fifteen days after the serving of the notice.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Bench of Magistrates, Sivaganga, in B. C. No. 106 of 1934.

V. Ramaswami Aiyar for Petitioner in Crl. R. C. No. 869 of 1935.

N. G. Krishna Aiyangar for Respondent in Crl. R. C. No. 129 of 1936.

The Public Prosecutor on behalf of the Crown in Crl. R. C. No. 129 of 1936 and the Petitioner in Crl. R. C. No. 129 of 1936.

Respondent in Crl. R. C. No. 869 of 1935 unrepresented.

The Court made the following

ORDER.—The petitioner in Criminal Revision Case No. 129 of 1936 was prosecuted under Sch. IV, R. 33 of the Madras Local Boards Act for non-payment of taxes. The Sivaganga Bench Court found that he was liable to pay such assessment as had been demanded of him before the Panchayat Board had increased it, and ordered him to pay at that rate for three years and to pay a fine of five rupees. One amount claimed by the Panchayat Board was disallowed on the ground that it was barred by limitation and another on the ground that as no proper notice had gone to the petitioner, the rent could not be enhanced. In appeal, the order of the Bench Court was confirmed. Two revision petitions have been filed, one by the Sivaganga Panchayat Board regarding the amount disallowed

and the other by the accused, in which he raises a number of technical pleas.

Panchayat Board, Sivaganga v. Pillathian Servai.

The pleas raised in Criminal Revision Case No. 129 of 1936 seem to be the same as those raised in the memo. of appeal by the accused, and the Joint Magistrate seems to have satisfactorily answered them. A principal ground of objection to the findings of the Courts below will also fail because of my findings in Criminal Revision Case No. 869 of 1935, filed by the Board. Criminal Revision Case No. 129 of 1936 is therefore dismissed.

One of the points raised on behalf of the Sivaganga Panchayat Board is that the order of the Panchayat Court in holding that proper notice had not gone to the accused is wrong. Sch. IV, R. 25 seems to contemplate the preparation of a list every half-year, showing the persons who have to pay taxes and the amount due by each of them. It is not however necessary for the President to prepare an entirely fresh list every half-year. He can adopt the old one with such amendments as may be necessary, subject only to the condition that he must prepare a completely fresh list once in every five years. It appears that the list complained of was prepared in the ordinary course of business by the Board at the end of a half-year for the purpose of levying taxes during the coming half-year. R. 25 would therefore apply, and that rule requires that only public notice of the amendments made in the list is necessary. Such public notices are given, as laid down in R. 23, by beat of drum in the village. Presumably this was done in the ordinary course of business and no allegation has been made by the accused that this rule was not complied with. The complaint of the accused, which has been upheld by the two Courts below, is that the accused was not given an individual notice. I agree with the learned counsel for the petitioning Board that such individual notice is necessary only when the President of the Panchayat Board makes an alteration in the assessment at some time other than the occasion on which he prepares the half-yearly list. The Panchayat Court has erred on this point. Allowing the higher assessment, the Panchayat Board will be entitled to a further sum of Rs. 40-10-0.

It is also argued that even in respect of the rent for the year 1930-31 the claim is not barred. As I understand S. 222 of the Local Boards Act, the prosecution must be launched

Panchayat Board, Sivaganga v. Pillathian Servai.

within three years from the date on which the prosecution might first have been commenced. Turning to R. 32 (2) we find that a notice of demand is to be sent to the assessee. If he does not pay within 15 days, his property can be distrained; and if the distraint of the defaulter's property is impracticable, the President may prosecute him before a Magistrate—*See* R. 33 (2). The prosecution must therefore be launched within three years of the date on which distraint becomes impracticable. In the present case, the impracticability of distraint arose because the accused removed his movables from his house; and it is from the date of his doing so, that the distraint became impracticable. The Board could not take action within 15 days of the sending of the notice and it is probable that the accused removed his property upon receiving notice. If, in fact, the accused removed it at some later date than the first day upon which the distraint was permissible under R. 33, it was the duty of the Panchayat Board, especially in a criminal prosecution, to prove exactly at what later date the property was removed. They not having done that, we must presume that distraint became impracticable on the very day on which the Board is authorised by R. 33 to distrain property, that is, 15 days after the serving of the notice. Admittedly, the prosecution was not within three years of that date, as far as 1930-31 is concerned. I therefore find that the Bench Court was right in this respect.

In the result, the petition is allowed with respect to the enhanced rent Rs. 40-10-0 and the order of the Bench Court amended accordingly.

Cr. R. C. 129 of 1936 dismissed.

B. V. V. *Cr. R. C. 869 of 1935 allowed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VARADACHARIAR, MR. JUSTICE BURN AND MR. JUSTICE PANDRANG ROW.

The Board of Commissioners for the Hindu Religious Endowments, Madras .. *Petitioner** (*1st Respondent*)

v.

P. V. R. Ratnasami Pillai and others. *Respondents* (*Petitioners 1 to 6 and 9 to 12 and 2nd Respondent*).

F.B.
The Board of Commissioners for the H. R. E., Madras *v.* Ratnasami Pillai.

Hindu Religious Endowments Amendment Act (IV of 1930)—Decision in 1927 that temple is "an excepted temple"—Definition changed in 1930—Board holding later it is not an excepted temple—If valid—Retrospective operation of statute—Finality under S. 84—Effect of.

A decision by the Endowments Board in 1927 that the temple in question was an 'excepted temple' within the meaning of the definition of that expression as it stood in the Hindu Religious Endowments Act of 1927 does not preclude the Board from subsequently holding after the Amending Act of 1930 came into force that under the new definition of that expression in the 1930 Act, it is not an 'excepted temple'. There is no scope here for the application of the rule against retrospective operation, because there is really no question of any interference with a vested right or impairing obligations which have come into existence under a previous state of the law, but only a grouping of temples in one manner at a particular stage of legislation and in a different manner at a later stage of legislation. Also the finality attaching to a decision of the Board by S. 84 can only have relation to the definition then obtaining and not to a later legislative variation of the definition.

Rajagopala Chettiar v. *Hindu Religious Endowments Board*, (1933) 40 L. W. 288, overruled.

Petition under S. 115 of Act V of 1908 praying the High Court to revise the order of the District Court of West Tanjore at Tanjore dated 21st August, 1934 and made in O. P. No. 221 of 1933.

P. V. Rajamannar for Petitioner.

K. V. Srinivasa Aiyar for Respondents.

The judgment of the Court was delivered by

Varadachariar, J.

Varadachariar, J.—This is a revision petition asking this Court to revise the order passed by the District Judge of West Tanjore on an application presented to him under S. 84 of the Madras Hindu Religious Endowments Act. The point raised

* C. R. P. No. 2001 of 1934. 17th November, 1936.

F.B.

The Board of Commissioners for the H. R. E., Madras *v.* Ratnasami Pillai.

Varadachariar, J.

in the case has been decided by Cornish, J., adversely to the Board, in another case *Rajagopala Chettiar* v. *Hindu Religious Endowments Board*[1], as the correctness of that decision was challenged on behalf of the petitioner, this case has been directed to be posted before this Bench for determination of the question.

The Hindu Religious Endowments Act of 1927 defined an 'excepted temple' in certain terms in cl. 5 of S. 9. By an Amending Act of 1930 a new definition has been substituted. Some time in 1927, the temple, to which this application relates, was held by the Board to be an 'excepted temple' within the meaning of the definition as it stood in the Act of 1927. After the Amending Act of 1930 had been passed, the Board has held that according to the new definition this temple is not an excepted temple. Against this latter decision of the Board the trustees of the temple filed the application out of which the present revision petition arises. The learned District Judge set aside the order of the Endowments Board on the grounds (1) that the former decision of the Board has become final and (2) that the Amending Act IV of 1930 cannot take away the right acquired by the trustees under that decision as there are no words expressly declaring the Act retrospective.

The argument that the former decision has become final could not be and was not seriously pressed. In the nature of things, the Board could have given a decision in 1927 only with reference to the definition as it then stood and the finality attached by S. 84 to such a decision can also have relation only to that definition. Properly understood, the decision merely means that the institution was an excepted temple within the meaning of Act II of 1927. It cannot be suggested that it is not open to the legislature to vary that definition. On such variation, the question for determination will be whether the institution is an excepted temple within the meaning of the new definition. A decision that an institution satisfies a particular definition cannot certainly mean a decision that it must satisfy the new definition.

On behalf of the respondents, more serious reliance has therefore been placed upon the argument that by reason of the former decision the trustees had acquired a vested right which

1. (1933) 40 L.W. 288.

F.B.

The Board of Commissioners for the H. R. E., Madras *v.* Ratnasami Pillai.

Varadachariar, J.

could not be affected by the amendment of the law, in the absence of words in the Amending Act making the amendment retrospective in its operation. It is this contention that receives support from the decision of our learned brother Cornish, J., in *Rajagopala Chettiar* v. *Hindu Religious Endowments Board*[1]. The matter has been argued at some length on behalf of the respondents and we have carefully considered the decision of the learned Judge. We have come to the conclusion that there is no scope here for the application of the rule against retrospective operation, because there is really no question of any interference with a vested right or impairing obligations which have come into existence under a previous state of the law.

There is nothing like a recognised legal right or category of right known to general jurisprudence that is connoted by the expression 'excepted temple'. It was merely a grouping or classification adopted by the Legislature in 1925 as a convenient method of referring to a certain class of temples with a view to lay down certain rules in relation thereto in the body of the Act. No doubt, as long as the Act stood in that form, temples which fell in the category of excepted temples were intended to be dealt with in a particular way and temples comprised in the category of non-excepted temples were intended to be dealt with in another way. But it does not seem to us reasonable to suggest that there was a kind of guarantee that, once the Legislature has thought fit to say that a particular temple will be dealt with in a particular manner, it should never afterwards be dealt with in a different manner. There is no question in the present case calling for the determination of the rights and liabilities of parties *in respect of any acts done already, i.e.*, during the time the old Act was in force. The question is merely what is to be the method of supervision over the particular temple after the amendment has come into force and what are its liabilities in the future in the matter of contribution and so on? The cases referred to in the judgment of Cornish, J., namely, *Lemm* v. *Mitchell*[2], *The Delhi Cloth and General Mills* v. *Income-tax Commissioner, Delhi*[3], as well as the decisions in *Ramakrishna Chetty* v. *Subbaraya Aiyar*[4] and *Thirumalaisami Naidu* v. *Subramanian Chettiar*[5] which were

1. (1933) 40 L.W. 288.
2. (1912) A.C. 400.
3. (1927) 53 M.L.J. 819: L.R. 54 I.A. 421: I.L.R. 9 Lah. 284 (P.C.).
4. (1912) 24 M.L.J. 54: I.L.R. 38 Mad. 101.
5. (1916) I.L.R. 40 Mad. 1009.

F.B.

The Board of Commissioners for the H. R. E., Madras v. Ratnasami Pillai.

Varadachariar, J.

cited in the course of the arguments before us, are not in our opinion applicable here. They clearly relate to rights which had accrued to parties under the previous state of the law and we have no doubt that the general principle of construction in such cases is that a vested or accrued right is not *prima facie* affected by a change of the law in the absence of express words or necessary implication to the contrary. But, as we have endeavoured to show, there is really no question of vested right in any sense known to the general law here but only a grouping of temples in one manner at a particular stage of legislation and in a different manner at a later stage of legislation.

We are accordingly unable to follow the decision in *Rajagopala Chettiar* v. *Hindu Religious Endowments Board*[1]. We are of opinion that the learned District Judge was in error in thinking that the order of the Board was erroneous on the grounds given by him in paragraph five of his judgment. The order is accordingly set aside and the case remanded to the District Court to be dealt with on the merits. The costs of this revision petition will be costs in the cause.

S. V. V. —— *Order set aside and case remanded.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VARADACHARIAR, MR. JUSTICE BURN AND MR. JUSTICE PANDRANG ROW.

The Secretary to the Board of Revenue (Separate Revenue), Triplicane, Madras .. *Petitioner** (*Referring Officer*)

v.

Madura Mills Company, Limited .. *Respondent.*

F.B.

The Secretary to the Board of Revenue v. Madura Mills Co., Ltd.

Stamp Act (II of 1899), S. 2 (10)—"Conveyance"—Contract regarding allotment of shares by company—Statement in Form VII filed before Registrar under S. 104, Companies Act—Whether amounts to transfer of property or agreement—Stamp duty payable thereon.

By an agreement between *M* Co. and *H* Co., it was agreed that a certain number of fully paid up shares in *M* Co. should be allotted to *H* Co. in consideration of an allotment by the latter to the former of certain fully paid

1. (1933) 40 L.W. 288.

* Referred Case No. 6 of 1935. 19th November, 1936.

F.B.

The Secretary to the Board of Revenue v. Madura Mills Co., Ltd.

up shares in *H* Co., as well as of an agreement to do ginning for *M* Co., at a specified rate for a certain period. The original agreement was only oral but its substance had been embodied in resolutions recorded in books of both the companies. A statement embodying the above particulars and an agreement bearing a twelve annas stamp were filed by *M* Co., before the Registrar, and though the agreement was calculated to suggest that the allotment was intended to be made in the future the case proceeded on the footing that the allotment had been made when the statement was filed before the Registrar. The question was raised as to the stamp duty payable on the contract included in Form VII filed with the Registrar under S. 104 of the Companies Act.

Held, that the contract of which the particulars were recorded in Form VII did not amount to a conveyance and that it was liable to stamp duty only as an agreement. The allotment of shares would not by its very nature amount to a transfer of property within the meaning of S. 2 (10) of the Stamp Act because the company cannot be regarded in any sense as the owner of its own shares, so that when it issues or allots shares, it cannot be said to be transferring property.

Bhola Ram & Sons, Ltd. v. *The Crown,* (1934) I.L.R. 15 Lah. 501 (S.B.) and In re *Swadeshi Cotton Mills Co., Ltd.,* (1932) 30 A.L.J. 394 (F.B.), considered.

Case stated under S. 57 of Act II of 1899 (Stamp Act) by the Secretary to the Board of Revenue (separate revenue) Madras, dated 18th June, 1935.

The Government Pleader (*K. S. Krishnaswami Aiyangar*) and *K. S. Champakesa Aiyangar* for Government.

S. Duraiswami Aiyar instructed by *Messrs. King and Partridge* for Respondents.

The judgment of the Court was delivered by

Varadachariar, J.

Varadachariar, J.—The question arising for decision in this reference relates to the stamp duty payable on a certain form filed with the Registrar under S. 104 of the Indian Companies Act.

By an agreement between the Madura Mills, Limited, Madura, and Harveys, Limited, Tuticorin, it was agreed that 20,000 fully paid-up shares in the Madura Mills should be allotted to the Harveys in consideration of an allotment by the latter to the former of 1,000 fully paid-up shares of Harveys as well as of an agreement to do ginning for the Madura company at a specified rate for a period of ten years. It is stated that the original arrangement was only oral, but its substance has been embodied in resolutions recorded in the books of both the companies. Under S. 104 of the Indian Companies Act it is required that where a contract relating to the issue of shares fully paid up otherwise than in cash has not been reduced to writing, the company shall, within one month after the allotment, file with the Registrar the prescribed

F.B.

The Secretary to the Board of Revenue *v.* Madura Mills Co., Ltd.

Varadachariar, J.

particulars of the contract stamped with the same stamp duty as would have been payable if the contract had been reduced to writing. A statement embodying the above particulars was accordingly filed by the Madura Mills before the Registrar on 29th August, 1933. There was also produced an agreement dated 26th March, 1933, bearing a twelve annas stamp.

The language of the agreement dated 26th August, 1933, is calculated to suggest that the allotment had not yet been made but was intended to be made *in futuro*. Similar language appears in some of the other papers also before us. This is scarcely reconcilable with the scheme of S. 104 of the Indian Companies Act, nor with the records in the case of what actually happened. The Collector's letter to the Board of Revenue shows that Harvey's shares were allotted on or before 1st August, 1933, and the Madura Mills shares were allotted on 2nd August, 1933. Mr. Duraiswami Aiyar therefore agreed that we might deal with the case on the footing that an allotment had in fact been made when the statements were filed before the Registrar. He nevertheless maintained that this makes no difference so far as the present question is concerned because he contended that the allotment of shares will not amount to a 'conveyance' within the meaning of the definition in S. 2, cl. (10) of the Stamp Act. There are other provisions made in the Stamp Act with reference to letters of allotment as well as share certificates. The question in the present case arises not with reference to the letter of allotment itself but as to the *consideration* for such allotment, when the allotment has been made as of shares fully paid up otherwise than in cash. S. 104 contemplates that the consideration for such allotment may be either a contract of sale or a contract for services or the consideration may be in other forms. The stamp duty payable will therefore vary according as the consideration consists of a sale of property or of an agreement of any other kind.

The Collector who referred the matter to the Board for opinion was apparently inclined to think that the reciprocal allotment must be regarded as amounting to a sale and therefore the transaction was liable to stamp duty as a conveyance. Before the Collector as well as before the Board, reliance seems to have been placed on the decision of the Lahore High

F.B.

The Secretary to the Board of Revenue *v* Madura Mills Co., Ltd.

Varadachariar, J.

Court in *Bhola Ram & Sons, Ltd.* v. *The Crown*[1], in support of the argument that where a transaction does not amount to a conveyance but is merely an agreement to convey, the document does not require to be stamped as a conveyance. The facts in that case are not quite analogous to those of the present but there can be very little doubt as to the correctness of the general principle therein recognised. See also In re *Swadeshi Cotton Mills Co., Ltd.*[2]. The Board's reference incidentally mentions another argument advanced before it on behalf of the party, namely, that there was no question of conveyance here, because the transaction did not relate to immovable property. There is no substance in that argument, as the Board themselves observe, because the definition of conveyance in the Stamp Act will apply as much to the transfer of movable as to the transfer of immovable property.

Before us, Mr. Doraiswami Aiyar puts his argument on two grounds. He contended that though the allotment was complete it did not by its very nature amount to a 'transfer of property' within the meaning of the definition of conveyance because the company cannot be regarded in any sense as the *owner* of its own shares, so that when it issues or allots shares it cannot be said to be *transferring property*. It is one thing to say that shares are property in the hands of a *shareholder* (*e.g.*, S. 28 of the Companies Act), but it is a wholly different position when the shares are being for the first time issued by the company itself. Alternatively, he contended that even if there should be any possibility of regarding this transaction as in the nature of a 'sale' of shares, it would not amount to a 'conveyance' unless property has passed thereunder, that according to the definition of 'goods' in the Sale of Goods Act, shares are 'goods', that under S. 4 of the Sale of Goods Act a 'contract of sale' is nothing more than an 'agreement to sell' until the property in the goods to be sold passes, and that under S. 18, where there is a contract of sale of 'unascertained' goods no property is transferred to the buyer unless and until the goods are ascertained. In the present case, at the time of the oral arrangement the particulars of which were filed before the Registrar, there had been no appropriation of any *specified* shares in either company to the other company in pursuance of the allotment and he accordingly maintained that the trans-

1. (1934) I.L.R. 15 Lah. 501 (S.B.). 2. (1932) 30 A.L.J. 394 (F.B.).

F.B.

The Secretary to the Board of Revenue v. Madura Mills Co., Ltd.

Varadachariar, J.

action could amount to anything more than a mere 'agreement to sell' within the meaning of S. 4 of the Sale of Goods Act. Reliance was placed in this connection on the observations of the Judicial Committee in *Maneckji Pestonji* v. *Wadilal Sarabhai & Co.*[1] In the view that we take on the first question, it does not seem to us necessary to express any opinion on the second.

On the first question, the learned Government Pleader did not dispute the proposition that a company cannot be regarded as holding its own shares. But he nevertheless suggested that there is nothing in regarding the company as *owning* the shares which it issues and in that sense it may be possible to bring the case within the definition of 'conveyance' in the Stamp Act. We find it difficult to follow this distinction. As we have already observed, it is no doubt true that in the hands of a shareholder, a share is property and when a shareholder exchanges his shares with another it may be possible to regard the transaction as amounting to a transfer whether by way of exchange or conveyance—Cf. *Coats* v. *Inland Revenue Commissioners*[2]. But when the company is for the first time issuing shares, it seems to us that there is no question of *property* already possessed by the company being thereby *transferred* to the allottee. Whatever may be the exact nature of the right which the allottee acquires between the date of allotment and the date of the entry of his name in the register, it is difficult to regard the issue of the shares to him by allotment as amounting to a 'transfer of property' by the company to him. On this ground, we must hold that the contract of which the particulars were recorded in Form VII did not amount to a 'conveyance', and that Form VII was properly treated by the parties as an 'agreement'.

B. V. V. —— *Reference answered.*

1. (1926) 51 M.L.J. 1: L.R. 53 I.A. 92: I.L.R. 50 Bom. 360 (P.C.).
2. (1897) 2 Q.B. 423.

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Madras.]

PRESENT:—LORD BLANESBURGH, LORD THANKERTON AND SIR SHADI LAL.

Talluri Venkata Seshayya and others .. *Appellants**

v.

Thadikonda Kotiswara Rao and others .. *Respondents.*

P.C.

Venkata Seshayya *v.* Kotiswara Rao.

Civil Procedure Code (V of 1908), S. 11—Representative suit regarding temples—Negligence in conduct of litigation—Omission to produce documents and place available evidence before Court—Subsequent suit regarding same subject-matter—Proof of fraud and collusion—Bar of res judicata.

The provisions of S. 11 of the Civil Procedure Code are mandatory and the ordinary litigant who claims under one of the parties to the former suit can only avoid its provisions by taking advantage of S. 44 of the Evidence Act which defines with precision the grounds of such avoidance as fraud and collusion. It is not for the Court to treat negligence or gross negligence as fraud or collusion, unless fraud or collusion is the proper inference from the facts.

The plaintiffs as representing the general public sued for a declaration that certain temples were public and for setting aside certain alienations. They charged the members of the founder's family now represented by respondent 1 with breach of trust and the other respondents represented the interests of certain alienees and they contended that the temple was private. The question whether the temple was private or public had been raised before the Courts in a prior suit and it was then decided by the trial Court that the temple was private and the decision was affirmed in appeal. The present plaintiffs contended that the prior suit was not a *bona fide* litigation and that there was gross negligence in the plaintiff's conduct of that suit inasmuch as they had failed to produce certain documents in Court and they had also omitted to place the plaintiff's evidence before the High Court on appeal. The question was raised whether the present suit was barred by the principle of *res judicata.*

Held, that there being no evidence that there was either want of *bona fides* or collusion on the part of the plaintiffs in the prior suit the decision therein was binding on the present plaintiffs, and that their suit was barred by *res judicata.*

The principle of S. 44 of the Evidence Act cannot be extended to cases of gross negligence.

Karri Bapanna v. *Yerramma,* (1923) 45 M.L.J. 324, disapproved.

Decision of the Madras High Court (Phillips and Ramesam, JJ.) affirmed.

Appeal from a judgment and decree dated the 30th November, 1927, of the High Court of Judicature at Madras setting aside a judgment and decree dated the 5th February, 1925, of the Court of the Subordinate Judge, Masulipatam.

---

* P. C. Appeal No. 6 of 1931. 20th November, 1936.

P.C.

Venkata Seshayya v. Kotiswara Rao.

The main question for determination in this appeal is whether the suit is barred by the rule of *res judicata.* The facts material to this appeal are stated fully in the judgment of their Lordships.

A. M. Dunne, K.C. and *M. Chinnai Durai* for Appellants.—The plaintiff's suit ought to have been decreed on the concurrent finding by the Subordinate Judge and by the High Court that the suit temples are public temples. The suit as framed under O. 1, r. 8 of the Civil Procedure Code, is maintainable in the circumstances of the case. S. 92 of the Civil Procedure Code has no application whatever. In the previous suit of 1891 there was gross negligence on the part of the plaintiffs inasmuch as the plaintiffs did not produce the relevant and material documents which would go to prove that the trust created was of a public nature, and not a private trust, and inasmuch as in the appeal in the previous suit the plaintiff's evidence oral and documentary was not put before the Appeal Court, and the Appeal Court decided the appeal on the evidence of the defendant alone.

P. V. Subba Row for Respondents.—The temples are private temples and the suit properties were the private properties of the family and the plaintiffs can have no interest therein. The temples were private at all material times and, in any case, the alienations were for purposes binding on the temple and the conclusions of the Subordinate Judge are erroneous. The decision in the suit of 1891 bars the present suit. The view of Ramesam, J., in the present suit that the temples are public temples is erroneous. The decree of the High Court dismissing the plaintiff's suit is right.

20th November, 1936. Their Lordships' judgment was delivered by

Lord Thankerton.

LORD THANKERTON.—This is a consolidated appeal from a judgment and decree of the High Court of Judicature at Madras, dated the 30th November, 1927, whereby a judgment and decree of the Subordinate Judge of Masulipatam, dated the 5th February, 1925, was set aside and the appellants' suit was dismissed.

The present suit was instituted on the 21st August, 1923, by the present appellants, along with a fifth plaintiff who died during the trial, as representing the interested public, under O. 1, r. 8 of the Code of Civil Procedure, with the requisite permission of the Subordinate Judge of Masulipatam. The plaintiffs seek a declaration that five temples of the village of Vellatur, Guntur District, are public temples and that certain inam lands, situated in Kowthavaram village, form the endow-

P.C.

Venkata Seshayya *v.* Kotiswara Rao.

Lord Thankerton.

ment of these temples, and they seek to have set aside: (*a*) a permanent lease in respect of these lands executed on the 6th December, 1888, by the then managers of the temples, (*b*) a mortgage deed on the security of these lands, dated the 3rd November, 1900, and (*c*) the Court Sale effected in execution of the decree obtained on the basis of the said mortgage in O. S. No. 29 of 1911, on the file of the District Court of Kistna; they further seek restoration of possession of these lands to the first defendant, who is the present hereditary Dharmakartha of the temples. The other defendants are the persons who are in possession of the temple lands, claiming under the permanent lessee, and the members of an undivided family, who purchased the right to the annual rent reserved under the permanent lease.

Three main questions were argued before their Lordships, namely, (1) whether the suit is barred by limitation, (2) whether the suit is maintainable under O. 1, r. 8 of the Code of Civil Procedure, and (3) whether the suit is barred by *res judicata.* The appellants' failure on any one of these questions will involve the dismissal of the appeal. In the view that is taken by their Lordships, the suit is barred by *res judicata,* and it becomes unnecessary to deal with, or express any opinion upon, either of the other two questions, or the particular facts out of which they arise.

The five temples in suit were built early in last century by one Thadikonda Seshayya, a native of Vellatur and the grandfather of the first respondent's adoptive father, who had amassed wealth in Hyderabad and had returned to his native place. The temples were built for the deities of Siddhi Ganapati Swami, Rajeswara Swami, Bhimeswara Swami, Adi Seshachala Swami and Kameswara Maharani, and Thadikonda Seshayya conducted the festivals and the other affairs of the deities during his lifetime; he left a will, dated the 26th August, 1826, shortly before his death, directing his widow, Adilakshmamma, to make a permanent endowment for the temples to the extent of Rs. 70,200 out of his self-acquired properties. The widow purchased two sets of properties in the villages of Kowtharam and Peddapulivarru for the temples, conducted the affairs of the temples out of the lands so purchased, and afterwards made a formal gift of the lands to the idols. Another set of properties in the village of Vellatur was endowed to the same temples by the Zamindar of Narasaraopet.

P.C.
Venkata Seshayya v. Kotiswara Rao.
Lord Thankerton.

Seshayya's two sons, Siddhi Ganapati Doss and Nagabhushana Gajanana Doss, conducted the festivals and other affairs until the death of Ganapati in 1857. The latter's widow claimed the Dharmakartaship, but the Collector decided in favour of Gajanana. In 1859 the Inam Commissioner granted an Inam title deed in respect of the Devadayam Inam situated in the village of Kowtharam. In 1867 Gajanana started borrowing money on the security of the Devadayam lands, which culminated in a usufructuary mortgage for Rs. 8,000, dated the 15th January, 1887, under which the lands of Kowtharam were handed over to the mortgagee. In order to discharge this mortgage, Gajanana and his adopted son Seshayya, granted the permanent lease of Kowtharam lands, dated the 6th December, 1888, which is in suit, and the mortgagee, Gopalkrishnamma, on the same day executed the counterpart of the lease.

On the 18th January, 1891, two persons, interested in the temples and in the performance of the service and worship thereof, who had obtained the leave of the Court under S. 18 of the Religious Endowments Act (XX of 1863), filed a suit, O. S. No. 4 of 1891 on the file of the District Court of Kistna, against Gajanana, his adopted son Seshayya and Gopalakrishna, the permanent lessee, claiming that the five suit temples at Vellatur were public temples and praying for the removal of the first two defendants from the office of Dharmakarta. The main defence was that the temples and lands were private property to which the Act XX of 1863 did not apply. Gajanana died before the suit was heard. In a judgment dated the 5th February, 1892, the District Judge of Kistna dismissed the suit, holding that the temples were private and that the lands were a private foundation, and that Act XX of 1863 did not apply. An appeal by the plaintiffs to the High Court of Madras was dismissed by a judgment dated the 3rd August, 1893.

The respondents' plea of *res judicata* rests upon these judgments, but, before dealing with them, it will be convenient to refer to the subsequent history of the temples and the Kowtharam lands in suit.

On the 3rd November, 1900, Seshayya mortgaged for Rs. 4,000 his rights in the Kowtharam lands, subject to the permanent lease, and the Vellatur lands to Vadlamannati Srinivasa Dikshit. Seshayya died about 1905 leaving a will

by which he appointed executors and gave them directions for the management of the temples and the properties. He was survived by his widow, Subbama, who brought a suit on the 22nd October, 1908 (O. S. No. 65 of 1908 in the District Court of Guntur) against the executors of her husband's will, Srinivasa, the mortgagee, and others, claiming the Vellatur lands on the ground that she had succeeded Seshayya as Dharmakarta and that the mortgage of 1900 and other alienations by Seshayya were not valid. This suit, which did not relate to the Kowtharam lands, was subsequently renumbered as O. S. No. 84 of 1910, and, on the 14th February, 1913, the Subordinate Judge of Guntur decided in favour of Subbama, holding that the Vellatur lands were public endowments to the temples and the mortgage of 1900, so far as relating to the Vellatur lands, was not binding on Subbama as hereditary manager of the temples.

Meantime, Srinivasa had brought a suit on his mortgage in the District Court of Kistna (O. S. No. 29 of 1911) against Subbama and the executors of Seshayya, in which Subbama contended that the mortgage was not binding on the properties. The Court granted a mortgage decree on the 31st July, 1912.

Appeals were taken in the Guntur suit of 1910 and the Kistna suit of 1911 to the High Court of Madras, and judgment in both the appeals was delivered on the 23rd March, 1913. The High Court held that the mortgage of 1900 was binding on Kowtharam lands but not on Vellatur lands, and that the Kowtharam lands were liable to be sold. The decree of the Kistna Court was modified by dismissing the mortgagee's suit so far as Vellatur lands were concerned. On the 15th April, 1919, Srinivasa purchased the mortgaged properties at Kowtharam in execution of his mortgage decree. The appellants seek cancellation of this sale in the present suit.

Shortly after the decision of the High Court of Madras, Subbama adopted the first respondent, and the validity of the adoption, although raised in the suit, is no longer challenged by the appellants, in view of the concurrent findings of the Courts below.

It is unnecessary to refer to certain other suits which were brought during the intervening period before the present suit

P.C.
Venkata Seshayya v. Kotiswara Rao.
Lord Thankerton.

was brought in 1923. It is now necessary to return to the suit of 1891.

Mr. Dunne, on behalf of the appellants, conceded that, subject to the question of *bona fides*, the present appellants must be deemed to be claiming under the plaintiffs in the 1891 suit within the meaning of Explanation VI of S. 11 of the Civil Procedure Code, as they were both claiming as representing the public interest in the temples and the Kowtharam lands. He further conceded that the matter in issue in the two suits was substantially the same. But the appellants maintain that the 1891 suit was not a *bona fide* litigation, that it was brought by the plaintiffs in collusion with the defendants, and that there was gross negligence in the plaintiffs' conduct of the suit; and that, accordingly, it could not form *res judicata* against the present plaintiffs.

The appellants' contention is founded on the non-production of a deed of gift of 1838 and of some of the documents connected with the inam enquiry, and also on the fact that, on their appeal to the High Court, the plaintiffs did not place their own oral and documentary evidence before the High Court, but only the defendants' evidence.

The learned Subordinate Judge held that the plaintiffs in the suit of 1891 had been guilty of gross negligence in the conduct of the proceedings before the Courts and that therefore the decision in such a suit could not bind the present plaintiffs or the worshippers at large. This decision was reversed by the High Court, who held that the plaintiffs in the 1891 suit were not guilty of fraud or collusion, or even of gross negligence. In both Courts the principles relating to negligent conduct of a former litigation by a guardian in the name of a minor were accepted as applicable to the case of parties litigating on behalf of a public interest, as in the present case. The cases illustrative of this principle, which are referred to in the judgments, are *Lalla Sheo Churn Lal* v. *Ramnandan Dobey*[1], *Punnayyah* v. *Viranna*[2], *Karri Bapanna* v. *Yerramma*[3] and *Ananda Rao* v. *Appa Rao*[4]. Their Lordships are not concerned to discuss the validity of these decisions, or the elusive distinction between negligence and gross negligence, as they are satisfied that the principle involved in these cases is

---

1. (1894) I.L.R. 22 Cal. 8. 2. (1921) 42 M.L.J. 429: I.L.R. 45 Mad. 425.
3. (1923) 45 M.L.J. 324. 4. (1924) 47 M.L.J. 700.

not applicable to such cases as the present one. The protection of minors against the negligent actings of their guardians is a special one, and in these cases the plaintiff in the second suit was also the plaintiff in the former suit, although in the earlier suit he or she had sued through a guardian. Their Lordships would only add that they are not prepared to agree with the view expressed in *Karri Bapanna's case* (*supra*) that the principle of S. 44 of the Indian Evidence Act can be extended to cases of gross negligence.

The provisions of S. 11 of the Civil Procedure Code are mandatory, and the ordinary litigant, who claims under one of the parties to the former suit can only avoid its provisions by taking advantage of S. 44 of the Evidence Act, which defines with precision the grounds of such avoidance as fraud or collusion. It is not for the Court to treat negligence, or gross negligence, as fraud or collusion, unless fraud or collusion is the proper inference from the facts.

Under S. 11, explanation VI, of the Civil Procedure Code, the plaintiffs in the present suit are deemed to be claiming under the plaintiffs in the 1891 suit, and again the statute defines a condition as necessary to the applicability of the section, namely, that the plaintiffs of 1891 litigated *bona fide*.

In the opinion of their Lordships, no case of fraud apart from collusion being suggested, the appellants are bound to establish either that the 1891 decrees were obtained by collusion between the parties, or that the litigation by the 1891 plaintiffs was not *bona fide*.

At the hearing before their Lordships, the appellants based their case entirely on inferences to be drawn (*a*) from failure to produce to the Courts in the 1891 suit certain documents, and (*b*) from the omission to lay the plaintiffs' evidence before the High Court. The appellants' oral evidence in the present suit tending to show collusion in the 1891 suit was not accepted by the Subordinate Judge, and was not referred to before their Lordships. The Subordinate Judge's finding of gross negligence is very far from a finding of intentional suppression of the documents, which would amount to want of *bona fides* or collusion, or of such intentional suppression of the plaintiffs' evidence before the High Court. In their Lordships' opinion, there is no evidence in this suit which establishes either want of *bona fides* or collusion on the part of

P.C.

Venkata Seshayya v. Kotiswara Rao.

Lord Thankerton.

the plaintiffs in the 1891 suit, and, accordingly, the appellants have failed to show that the decisions in the 1891 suit are not binding on them as *res judicata*. It follows, on this ground alone, that the appeal must fail.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed with costs, and that the judgment and decree of the High Court dated the 30th November, 1927, should be affirmed.

Solicitors for Appellants: *Hy. S. L. Polak & Co.*

Solicitors for Respondents: *Harold Shephard.*

R. C. C. *Appeal dismissed.*

B. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Modeboyina Raghavalu .. *Petitioner** (*Complainant*)

v.

Oduvu Narasa Reddi and others.. *Respondents* (*Accused*).

Raghavalu v. Narasa Reddi.

Criminal Procedure Code (V of 1898), S. 204 (3)—Non-payment of batta to witnesses by complainant—Magistrate whether has power to dismiss the complaint.

Sub-section (3) of S. 204, Criminal Procedure Code, gives the Magistrate power to dismiss complaint when the complainant fails to pay any process fees or other fees. It is therefore wide enough to include non-payment of witness batta.

Amirthammal v. *Ratnaswami Padayachi*, 1933 M.W.N. 1266 and *Korapulu* v. *Monappa and others*, (1882) I.L.R. 5 Mad. 160, referred to and distinguished.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Stationary 2nd Class Magistrate of Gudur dated the 24th day of September 1935 and made in Calendar Case No. 328 of 1935.

K. Subramaniam for Petitioner.

Public Prosecutor on behalf of the Crown.

Respondent not represented.

---

* Cr. R. C. No. 887 of 1935.
Cr. R. P. No. 817 of 1935. 6th November, 1936.

Raghavalu *v.* Narasa Reddi.

The Court made the following

ORDER.—The petitioner brought a summons case and after the appearance of the accused he was given three days' time to pay witness batta in order that his witnesses might be summoned. As the batta was not paid the Magistrate dismissed the complaint, purporting to act under S. 204 (3), Criminal Procedure Code.

It is contended here that S. 204 (3) does not apply to non-payment of witness batta, and *In the matter of Korapulu* v. *Monappa and others*[1] has been cited to that effect. That was a case under the old Code when there was no section corresponding to S. 204 (3) of the present Code. The Magistrate purported to dismiss the complaint under S. 205 of that Code, which resembles S. 247 of the present Code. S. 247 provides for the acquittal of the accused in cases of non-appearance of the complainant. It was held in that case that S. 205 did not apply. There seems to be no reason to think that the power given to the Magistrate under S. 204 (3) does not apply to non-payment of witness batta. This sub-section gives the Magistrate power to dismiss the complaint when the complainant fails to pay any process fees or other fees. The section is therefore quite wide enough to include non-payment of witness batta. My attention has been drawn to the judgment of Burn, J., reported in *Amirthammal* v. *Ratnaswami Padayachi*[2]. There, in a warrant case, after the charge had been framed, the attendance of the witnesses for the complainant was necessary in order that they might be further cross-examined. It was held that in such a case the complainant should not be compelled to pay process fees. It followed that if he was not bound to pay process fees the complaint should not be dismissed for non-payment of those fees. Clearly that case has no application to the present case, which is a simple summons case where process fees were payable at the very commencement of the proceedings. The learned discussion of Burn, J., in that case would have been unnecessary if the petition could have been dismissed on the simple ground alleged in this petition.

I therefore find that the order of the Magistrate was correct and accordingly order that this petition be dismissed.

K. C. ——— *Petition dismissed.*

---

1. (1882) I.L.R. 5 Mad. 160. 2. (1933) M.W.N. 1266.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VARADACHARIAR.

Methar Rowther .. *Appellant** *(Defendant)*

v.

Sahu Moideen Rowther .. *Respondent (Plaintiff).*

Methar Rowther *v.* Sahu Moideen Rowther.

Civil Procedure Code (V of 1908), O. 21, rr. 97, 98 and 103—Plaintiff purchaser of defendant's brother's half share in suit properties in pursuance of his execution against defendant's deceased brother—Resistance to delivery—Order of Court recognising plaintiff's petition and refusal to accept defendant's plea of his purchase of that share from his brother's widow—Suit by plaintiff for recovery of possession of the half share—Whether defendant precluded from reagitating same pleas and how far.

Where the plaintiff sued the defendant for recovery of possession of a half share of the suit properties on the ground that he had purchased them in Court auction in execution of a decree obtained on a promissory note against the deceased brother of the defendant and the plaint also set out the circumstances, namely, that when the plaintiff originally attempted to take possession as execution purchaser, the defendant had resisted delivery alleging that he had obtained a sale of the same half share from his brother's widow and on being obstructed, the plaintiff had filed an application on which was passed an order of Court to the effect that the sale alleged by defendant was not supported by consideration and that he could have no manner of right to the half share which by right would have to be delivered to plaintiff, but when delivery was ordered only symbolical possession was given as the deceased brother's was an undivided half share in the property; on the question whether owing to the previous decision the defendant was barred from reagitating the matter in defence.

Held, that the previous order was one passed under O. 21, r. 98, Civil Procedure Code, and such an order could have been passed only after notice to the defendant and an investigation of the case as contemplated by sub-cl. 2 of r. 97 of O. 21. Since the terms of r. 103 of O. 21, Civil Procedure Code, clearly cover an order under r. 98 and so far as the conclusiveness enacted in the final part of r. 103 is concerned it can make no difference whether the question is sought to be reagitated by a person as plaintiff or as defendant, it should be held that the defendant here would be precluded from raising them again.

Ayyakutti Mankondan v. *Periasami Koundan,* (1913) 1 L.W. 31 and *Arumugha Padayachi* v. *Muthal Reddi,* (1930) M.W.N. 1051, distinguished.

It is however to be mentioned that the Court below went too far in holding every issue sought to be raised in this case must be taken to be precluded by O. 21, r. 103.

Second Appeal against the decree of the Court of the Subordinate Judge of Tinnevelly in Appeal Suit No. 112 of 1934 (A. S. No. 253 of 1934—District Court) preferred against the decree of the Court of the District Munsiff of Ambasamudram in Original Suit No. 46 of 1934.

---

* S. A. No. 488 of 1935. 4th November, 1936.

Methar Rowther v. Sahu Moideen Rowther.

P. N. Appuswami Aiyar for Appellant.

Respondent not represented.

The Court delivered the following

JUDGMENT.—This is an appeal by the defendant in a suit instituted for partition and recovery of possession of a half share of the suit properties on the ground that the plaintiff had purchased in Court auction, the right, title and interest of the defendant's brother, who according to the plaintiff was entitled to a half share in those properties. The Court auction was held in execution of a decree obtained on a promissory note said to have been executed by the first defendant's brother, the deceased Pakkiri Mohideen Rowther and his wife. When the plaintiff attempted to take possession as execution purchaser, the defendant resisted delivery alleging that he had obtained a sale of his brother's half share from his widow. On that obstruction, the plaintiff filed E. A. No. 367 of 1932 and it is alleged in paragraph 5 of the plaint that that petition was heard and an order was passed thereon by the Court on 13th October, 1932, to the effect that the sale obtained by the defendant was not supported by any consideration, that the defendant had no manner of right to the half share of his deceased brother and that the same should be delivered to the plaintiff. The plaint adds that delivery of possession was accordingly given to the plaintiff on 22nd October, 1932; but as the deceased was entitled only to an undivided half share there could have been, in the nature of things, no physical dispossession of the defendant and in that sense the delivery was only of symbolical possession.

When the plaintiff instituted this suit for partition on the strength of the title thus acquired, the defendant attempted to reagitate the questions put forward at the time, when he obstructed delivery. The 4th issue was accordingly framed and it raised the question " whether the defendant is barred from raising the said pleas?". Both the Courts below have held that the defendant is barred. Hence this appeal by the defendant.

I feel little doubt that the order on E. A. No. 367 of 1932 was one passed under O. 21, r. 98, Civil Procedure Code. Such an order could have been passed only after notice to the defendant and an investigation of the case as contemplated in sub-cl. 2 of r. 97. The terms of r. 103 of O. 21, Civil Procedure Code, clearly cover an order under r. 98; and so far as the

Methar Rowther v. Sahu Moideen Rowther.

conclusiveness enacted in the final part of r. 103 is concerned, it can make no difference whether the question is sought to be reagitated by a person as plaintiff or as defendant. The cases relied on by Mr. Appuswamy Aiyar, namely, *Ayyakutti Mankondan* v. *Periasami Koundan*[1] and *Arumugha Padayachi* v. *Muthal Reddi*[2], do not afford any help in the present case; because, in the former case, the order was passed under the old Code where the language of the rule then in question was somewhat different and as pointed out by Spencer, J., in that case it was not clear that the order was at all unfavourable to the party who was sought to be bound by the one year's rule. In *Arumugha Padayachi* v. *Muthal Reddi*[2], it does not appear that there was any resistance to delivery and an order in the presence of the party resisting, overruling his objection.

I am, however, inclined to think that the Courts below went too far in holding that every issue sought to be raised in this case must be taken to be precluded by O. 21, r. 103, Civil Procedure Code. If I found that there was any substance in the issue about adverse possession or the issue which attacks the validity of the decree in the promissory note suit, I should have directed an enquiry into those issues, because I cannot agree that even such questions could have been raised in the obstruction proceedings. But the issues seem to me so unsubstantial and untenable that it does not seem to be worth while putting the parties to the expense of a trial in respect thereof. A person in the position of the first defendant is not entitled to question the decree in S.C.S. No. 944 of 1930 on the ground that the promissory note then sued on was not genuine. Nor in the face of the allegations in the written statement, am I able to understand that there is any basis for the issue relating to adverse possession. I regret to be obliged to say that the issue has been raised without any regard to the pleadings. In the written statement the defendant admits that Pakkiri Mohideen Rowther was entitled to a half share and that he allowed the defendant to enjoy the property in lieu of interest on a sum of Rs. 106 which is said to have represented Pakkiri Mohideen Rowther's share in the expenses incurred by the defendant during their mother's illness. The sale to the defendant even as alleged in the written statement took place only in 1930. In these circumstances the plea of adverse possession is so

1. (1913) 1 L.W. 31. 2. (1930) M.W.N. 1051.

obviously untenable that I do not think the Court can take any further notice of it. The second appeal therefore fails and is dismissed.

Methar Rowther v. Sahu Moideen Rowther.

Leave to appeal is refused.

K. C. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR HORACE OWEN COMPTON BEASLEY, *Kt., Chief Justice.*

Mathuranayagam Pillai .. *Petitioner* (Defendant)*

v.

The Municipal Council, Madura, through its Commissioner S. Samuel Pillai .. *Respondent (Plaintiff).*

Mathuranayagam Pillai v. The Municipal Council, Madura.

Negligence—Tree being in old and dangerous condition—Municipal Council being aware of such condition—Erection of posts by Council—Tree subsequently falling and injuring post—Liability of owner of tree for damages—Conduct of Municipal Council in not taking steps for removal of tree—Whether amounts to contributory negligence.

A Municipal Council in exercise of its statutory powers erected some posts upon which to carry some electrical wires. It was then known to the Electrical Supervisor of the Council that there was near one of the posts a very old cocoanut tree belonging to the defendant standing on his land, but the Council took no steps permitted by law calling on the defendant to remove the tree as being a source of danger to the post erected by them. Subsequently the tree fell down on account of its old condition and caused damage to the post near by, and the Municipal Council after effecting the necessary repairs to the post sued the defendant for recovery of the amount expended by the Municipality on the repairs,

Held, that the Municipal Council was not entitled to recover the cost of repairs from the defendant as it was guilty of contributory negligence in not having taken the necessary steps for removal of the tree while being aware of its dangerous condition.

Petition under S. 25 of Act IX of 1887 praying the High Court to revise the decree of the Court of the District Munsiff of Madura Town in S. C. S. No. 2726 of 1933.

K. V. Srinivasa Aiyar for Petitioner.

R. Sundaralingam for Respondent.

The Court delivered the following

JUDGMENT.—The respondents here are the Municipality of Madura and in the exercise of their statutory powers they erected some posts upon which to carry some electrical wires. At the time when these posts were erected, it was plain to the first witness for the Municipality, the Municipal Electrical

---

* C. R. P. No. 1675 of 1934. 14th October, 1936.

Mathuranayagam Pillai v. The Municipal Council, Madura.

Supervisor, that there was a cocoanut tree belonging to the petitioner, the defendant in the suit, and standing on his property which was a very old one and ought to have been felled and removed. The tree, after the erection of the posts, fell and caused damage to a post. Repairs were effected to it by the Municipality and the petitioner was sued for the amount expended by them on those repairs. The learned District Munsiff gave the Municipality, a decree on the ground that the damage caused to the post was due to the negligence of the petitioner in not cutting down the old tree. According to the evidence and the finding the tree fell not on account of being blown over by any high winds, but on account of its old condition. It must be mentioned that under S. 219 of the Madras District Municipalities Act, the Municipality is empowered to call upon the owner of any tree to secure, lop, or cut it down should it be likely to endanger any person or structure and in the event of the notice being disregarded themselves either to cut or lop or remove the tree. Therefore the Municipality could have called upon the petitioner to remove it as being a source of danger to the post erected by them. That they knew of the dangerous condition of the tree is apparent from the evidence of P.W. 1, the Municipal Electrical Supervisor. He says that the tree was about 15 feet from where the post was and that even when the post was fixed there, he had seen the tree there and noted it as a very old one and feared that it might fall. He, however, did not send any report to the Chairman requesting him to send a notice to the petitioner. He says that he did not do so because it was not the practice to do so. He also adds that by a look at the tree he could say whether it was an old tree or not. The position therefore is that fully aware of the nearness of the tree to the post and that it was an old one and might fall and of course in falling cause damage to Municipal property, the Municipality nevertheless erected the post and having erected the post, they did not exercise the powers which are given to them under S. 219 of the Act. It is all very well to argue that the powers are merely permissive. That is quite true. But what is to be said of the position of a body which is invested with those powers, and knows of the danger and its imminence and what is likely to result in and stands by and suffers the danger to remain? In my view, this is clearest possible evidence of contributory negligence on the part of the Municipality. It is quite

true that the tree belonged to the petitioner and was on his land. It is not quite clear whether the post was erected on municipal land or defendant's land. It was stated by the learned Counsel for the petitioner that it was on his land. But this is contested by the respondents and I deal with the case on the assumption that the post was not standing on the petitioner's land at all. As contended by the petitioner if a person keeps upon his land something which he knows to be dangerous such as a tree in a dangerous condition and it falls over and damages somebody else's property, he must be held to be guilty of negligence. That as a general proposition is perfectly correct and nobody will contradict it. But there comes into this, the position of the respondents. As before stated, they knew perfectly well of the presence of this, according to them, very dangerous tree. They could, before erecting the post, have required the petitioner to fell the tree and remove it and if he had refused to do so they could themselves have felled it and removed it: Or they could have put up the post first and, having put it up, called upon the petitioner to remove it and on his failure to do so could have done so themselves. They did nothing. They stood by, knowing of the existence and presence of this dangerous tree and could themselves have avoided the danger and when that happened, which they themselves feared would happen, seek to make the petitioner responsible for it. There is no evidence at all, that the petitioner knew that the tree was dangerous; but assuming that he did, his attention was not called to it by the Municipality. Under these circumstances the District Munsiff not having addressed himself to the question of contributory negligence as he ought to have done and in my view there being clear evidence of contributory negligence which was really the cause of the damage, the Civil Revision Petition must succeed and be allowed with costs and the decree in the Court below reversed and the suit dismissed with costs.

B. V. V. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

C. R. Subbarama Aiyar, Proprietor, The Ganesh Bank, Chittoor (Cochin) .. *Petitioner** (*P. W. 5*)

v.

Kizhakke Purakkal Pazhani Velan's Son, Damodaran .. *Respondent* (*Complainant*).

Subbarama Aiyar *v.* Damodaran.

Criminal Procedure Code (V of 1898), S. 517—Scope—Return of property—Order of Magistrate—Revision to High Court—Interference when justified.

Under S. 517, Criminal Procedure Code, the Magistrate is given a very wide discretion regarding the return of the property and unless it is clear that he exercised it on some wrong principle and that he returned the property to somebody obviously not entitled to it, the High Court will not interfere with the Magistrate's order in revision.

In re *Pandharinath Pundlik*, (1915) I.L.R. 40 Bom. 186 and *Naini Mal* v. *Emperor*, (1923) 74 I.C. 708, referred to.

Shwe Wa v. *C. I. Mehta*, (1927) I.L.R. 5 Rang. 553, disapproved.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of Sessions of South Malabar Division dated 2nd July, 1936, made in Criminal M. P. No. 3 of 1936 preferred against the order of the Court of the Joint Magistrate, Palghat in Calendar Case No. 57 of 1935.

P. V. Venugopala Aiyar and *C. R. Venkatachala Aiyar* for Petitioner.

K. V. Ramaseshan for *T. S. Anantaraman* for Respondent.

The Public Prosecutor (*L. H. Bewes*) on behalf of the Crown.

The Court made the following

ORDER:—The accused in C. C. No. 57 of 1935 was found guilty of cheating with respect to a jewel. He falsely represented to the owner of the jewel that he wanted it for use at a wedding, and upon that representation the complainant gave it to him. The accused, instead of using it for that purpose, pledged it with the petitioner and raised a sum of money on it. The joint Magistrate, after convicting the accused, ordered the jewel to be returned to the complainant. P. W. 5, the present petitioner, appealed to the Sessions

---

* Cr. R. C. No. 525 of 1936.
Cr. R. P. No. 479 of 1936. 17th November, 1936.

Subbarama Aiyar v. Damodaran.

Judge of South Malabar, who upheld the order of the Joint Magistrate with respect to the jewel.

Two questions seem to arise in this petition:—(1) Whether the order of the Joint Magistrate was right, and (2) whether, even if it was wrong, this Court should interfere in revision. I have been taken through a number of rulings on the question whether a right to possession accrues to a pledgee where the pledge is taken *bona fide*; but all that it is necessary to say in these proceedings is that the matter is open to doubt, and that in this criminal case the question was of course never raised or decided whether P. W. 5, the petitioner, took the jewel *bona fide* or *mala fide*, and neither of the lower Courts could possibly have given a finding on that point. The Joint Magistrate had therefore to decide whether the jewel should be returned to the admitted owner or to a person whose legal right was in doubt, even if he had acted *bona fide*. Under such circumstances, I am not prepared to say that the order of the Joint Magistrate was wrong. A number of cases has been quoted in which a High Court in revision has found that the order of the lower Court was wrong and has ordered possession to be given back to persons from whom property was taken. One such case is In re *Pandharinath Pundlik*[1], where the right to possession was a very obvious one, in that the property passed was a currency note, with regard to which title passes with possession. In *Naini Mal* v. *Emperor*[2], 59 bags of mustard seeds were stolen, a part of which was sold *bona fide* to some merchants. Long afterwards, when the case came up for trial, the Magistrate ordered the merchants to refund to the complainant, not the mustard seeds actually stolen, but the equivalent of them; that is to say, the merchants were ordered to recompense the complainant and not merely to return stolen property. The case in *Shwe Wa* v. *C. I. Mehta*[3] was more like the present one, in that there was a breach of trust. The principle was laid down that where a question of right to possession exists between the complainant and a third person, the property should be returned to the third person. With all respect to the learned Judge who decided that case, I doubt whether we are entitled to go as far as that. If that were always the rule, then one would expect the wording of the Criminal Procedure Code

1. (1915) I.L.R. 40 Bom. 186.
2. (1923) 74 I. C. 708.
3. (1927) I.L.R. 5 Rang. 553.

Subbarama Aiyar *v.* Damodaran.

in S. 517 regarding the return of property to be much more explicit than it is. Moreover, in that case the Judge assumed that there could be no doubt that the person from whom the property was recovered was entitled in law to retain possession. The Magistrate is given a wide discretion, and unless it is clear that he exercised it on some wrong principle and that he returned the property to somebody obviously not entitled to have it, this Court in revision will be unwilling to interfere.

The petition is accordingly dismissed.

B. V. V. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VARADACHARIAR AND MR. JUSTICE HORWILL.

Hiralal Jindani .. *Appellant* (Applicant)*

v.

The Official Assignee of Madras and another .. *Respondents (Respondents).*

Hiralal Jindani *v.* The Official Assignee of Madras.

Insolvency—Applicant seeking declaration from the Insolvency Court that a certain amount paid by him on behalf of the insolvent as fine in a criminal action which was reversed later in appeal belonged to him and that it should be returned—Whether claim will lie—Estate of insolvent should be proceeded against—Proof necessary.

Where a person applied in the insolvency proceedings of an insolvent relative of his that a certain amount which had been paid by him in Court on behalf of the insolvent as fine imposed in a criminal action belonged to him and that it should be returned to him as a result of the reversal in appeal of the decision in the criminal case against the insolvent,

Held, that the appellant's right would be only against the insolvent's estate; and whether he would be entitled to claim it back in whole or in part would depend on whether he made present of it to a relative in trouble or whether he merely lent it and if so, on what terms. These would be matters which could not be taken to be proved either by the receipt granted by the Magistrate who received the money in the criminal action or by the production of the Bank's pass book showing the drawing of the amount from the appellant's account.

At the time when it was paid into the Criminal Court in payment of the fine imposed on the accused, the money must in law be deemed to have become the property of the accused because title thereto must pass to the Crown. There is no provision in the Criminal Procedure Code, that on reversal of the sentence the Crown must return the amount to anybody other than the accused, even if the amount had been paid by such other person. The proper assumption in such cases is that at the time of the payment of the fine all parties agreed that the money might be treated as property of the accused.

* O. S. A. No. 14 of 1936. 12th October, 1936.

In this view any proof by the applicant that he found the money in the first instance will not suffice to entitle him to get it back.

Hiralal Jindani *v.* The Official Assignee of Madras.

On appeal from the order of the Honourable Mr. Justice Wadsworth dated 24th February, 1936, and made in the exercise of the Insolvency Jurisdiction of the High Court in Application No. 44 of 1935 in I. P. No. 47 of 1934.

S. Sitarama Aiyar for Appellant.

V. Varadaraja Mudaliar and *P. S. Kothandapany* for Respondents.

The judgment of the Court was delivered by

Varadachariar, J.

Varadachariar, J.—This is an appeal against the order made by Wadsworth, J., on an application presented by the appellant in the insolvency of one Abbeyamul Sowcar, asking for a declaration that the sum of Rs. 1,000 which had been paid by the insolvent as fine when he was convicted in C. C. No. 939 of 1933 on the file of the Court of the Presidency Magistrate, Madras, is money belonging to the applicant and that he is entitled to a refund of the same.

For reasons which we need not state in detail, the application underwent a number of adjournment and when it came on for hearing on 24th February, 1936, the applicant was not able to be present to give evidence. The record however shows that as part of the evidence which he proposed to adduce, a pass book of the applicant relating to his account with the Indore Bank had been produced in terms of a consent order passed by Mockett, J., to show that at or about the relevant time the applicant withdrew the sum of Rs. 1,000 from his own account with the Indore Bank. This apparently was intended to answer the allegation in the Official Assignee's report that the applicant was not in a position to find Rs. 1,000 himself and that the amount must have been paid out of the insolvent's monies. We may here mention that Abbeyamul Sowcar was adjudged insolvent on 1st February, 1934, that he was convicted in the Magistrate's Court on the 9th April, 1934, that the fine of Rs. 1,000 imposed upon him was paid on 14th April, 1934, and the sentence was revised by this Court on appeal on 11th September, 1934.

The applicant relies on the fact that the receipt granted by the Magistrate at the time of the payment of the fine states that the money was paid on behalf of the accused by the applicant. Wadsworth, J., had held that the onus *prima facie*

Hiralal Jindani v. The Official Assignee of Madras.

Varadachariar, J.

lies upon the applicant to prove that the money belongs to him and as there is no evidence to establish the fact, the application must fail. Without adopting the same formula, the same result would nevertheless be reached by another course of reasoning as well. Assuming for the sake of argument that this sum of Rs. 1,000 was drawn by the applicant from his own account in the Indore Bank it would not follow therefrom that the applicant is now entitled to this amount. At the time when it was paid into the Criminal Court in payment of the fine imposed on the accused the money must in law be deemed to have become the property of the accused because title thereto must pass to the Crown. There is no provision in the Criminal Procedure Code that on reversal of the sentence the Crown must return the amount to anybody other than the accused, even if the amount had been paid by such other person. We think the proper assumption to make in such cases is that at the time of the payment of the fine all parties agreed that the money might be treated as the property of the accused. In this view any proof by the appellant that he found the money in the first instance will not suffice to entitle him to get it back. His right thereafter will be only against the insolvent's estate; and whether he will be entitled to claim it back in whole or in part will depend on whether he made a present of it to a relative in trouble or whether he merely lent it and if so, on what terms. These are matters which cannot be taken to be proved either by the receipt granted by the Magistrate or by the production of the Indore Bank pass book. The insolvent might have been examined as a witness on behalf of the applicant but that course has not been adopted.

Mr. Raghava Rao requested us to give his client an opportunity to examine himself and to adduce other evidence in support of the application; but the record shows that more than one adjournment had been obtained in the lower Court and on one occasion the application was even dismissed for default and subsequently restored. We quite sympathise with the applicant, who has to come down all the way from Indore for the purpose of giving evidence in this case. That is perhaps the very reason why he did not think it worth while. In these circumstances we are not prepared to interfere with the order of our learned brother refusing to grant any further adjournment in the matter; and on the record as it stands, his

order is right. This appeal fails and is dismissed with costs of the Official Assignee.

Hiralal Jindani *v.* The Official Assignee of Madras.

Varadachariar, J.

K. C. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATARAMANA RAO.

Masina Bavamma .. *Appellant** (*Plaintiff*)

v.

Yendru Papanna and others ... *Respondents* (*Defendants*).

Bavamma *v.* Papanna.

Civil Procedure Code (V of 1908), O. 21, rr. 58 to 63—Claim under r. 58 by a third party—Disallowance of claim—Suit under r. 63 by defeated claimant—Proof that attachment was invalid by reason of debtor's insolvency—If enough to decree the suit—Question of title must be gone into—Meaning of 'establish the right to' in r. 63.

Where in execution of a decree, the decree-holder attached certain properties belonging to the judgment-debtor, and a claim was put in under O. 21, r. 58 by the judgment-debtor's wife that it was her property but which claim was disallowed,

Held, that in a suit under O. 21, r. 63 by the wife to set aside the claim order, it is not enough to find that the attachment was invalid by reason of the fact that prior to the date of attachment, the judgment-debtor was adjudicated an insolvent and the execution was conducted without the leave of the Insolvency Court, but the Court must also find if the claimant was entitled to the property. The words 'to establish the right' in r. 63 clearly indicate that the plaintiff has to establish his *title* to the property in dispute before he can get the relief he wants, namely, the release of the property from attachment.

Appeal against the order of the Court of the Subordinate Judge of Cocanada dated 8th August, 1934 and made in A. S. No. 2 of 1934 preferred against the decree of the Court of the District Munsif of Peddapur dated 25th November, 1933 and made in O. S. No. 352 of 1932.

Y. Suryanarayana for Appellant.

C. Rama Rao for Respondents.

The Court delivered the following

JUDGMENT.—This appeal arises out of a suit instituted by the plaintiff-appellant under O. 21, r. 63, Civil Procedure Code, for a declaration that the property which is the subject-matter of the suit is her own property not liable to be attached in execution of a decree in S. C. S. No. 705 of 1931 on the file of the Sub-Court, Cocanada, obtained by the third defendant against her husband, the first defendant. It transpires that subsequent to the passing of the decree in the said suit the first defendant was adjudicated insolvent on the 15th March, 1932

*A. A. O. No. 102 of 1935. 6th August, 1936.

and all his property vested in the second defendant, the Official Receiver. The suit property was attached on the 13th April, 1932. The plaintiff preferred a claim under O. 21, r. 58, Civil Procedure Code, requesting the Court to release the property from attachment on the ground that the property is her own property as she purported to have purchased the same under a sale deed dated 10th November, 1930. The claim was resisted by the third defendant decree-holder on the ground that the transaction was *benami* for the benefit of the first defendant and not *bona fide*. The claim was disallowed on the ground that the transaction was not *bona fide*. Thereupon the plaintiff filed the present suit for a declaration that the suit property belongs to her and not to the first defendant, and therefore the property was not liable to be attached as the property of the first defendant. There was also another ground alleged for the release of the attachment, namely, that the attachment having been made subsequent to the first defendant's adjudication in insolvency without the leave of the Insolvency Court the attachment is invalid. The learned District Munsif who tried the suit upheld the latter objection and gave a decree in favour of the plaintiff without going into the question whether the plaintiff was entitled to the suit property or not. The learned Subordinate Judge reversed the said decision on the ground that even assuming that the attachment is invalid on the ground alleged still the plaintiff had to establish that the property belonged to her and that the question of title ought to have been determined by the District Munsif and therefore he remanded the suit for decision on the merits of the plaintiff's claim. It is against the order of remand that this appeal has been preferred. It is contended by Mr. Y. Suryanarayana on behalf of the appellant that it is not incumbent on the plaintiff to establish a title to the property but it is enough if she makes out that the attachment was invalid and therefore the property was not liable to be attached. He lays considerable emphasis on the language of O. 21, r. 58 that the claim or objection is preferred to the Court on the ground that the property is not liable to be attached and all that he has to show in the claim proceedings is that the property is not liable to attachment and if he satisfies the Court that by virtue of the insolvency proceedings the property is not liable to be attached, the Court is bound to release the property from attachment irrespective of the question of the claimant's title and O. 21, r. 63 being a

Bavamma v. Papanna.

continuation of the claim proceedings, it is enough if he is able to substantiate the invalidity of the attachment. In my view this contention is untenable. An examination of the relevant provisions of O. 21, rr. 58 to 63 clearly indicates that the scope of a suit under O. 21, r. 63 is to declare the title to the property which is sought to be attached in execution proceedings. The language of O. 21, r. 63 is clear and unambiguous. The party against whom the order is made under the previous rules is required to establish the right which he claims to the property in dispute. The words "establish the right" mean that the right claimed in the suit must be declared. If the plaintiff is an unsuccessful claimant he must establish that the property belongs to him or that he has some interest independent of the title of the judgment-debtor and therefore the property is not liable to be attached. If the plaintiff is the decree-holder he must establish that the property he seeks to attach is that of the judgment-debtor or the judgment-debtor has some interest therein which he is entitled to attach. Under O. 21, r. 58 no doubt the ground on which the claim or objection is to be preferred is that the property is not liable to attachment, but under O. 21, r. 59 what the claimant or objector has to show is indicated. He must establish that at the date of the attachment he has some interest in or was possessed of the property attached, *i.e.*, a sufficient interest to enable the Court to maintain him in possession of the property as against the judgment-debtor. This is made sufficiently plain by the following rules 60 and 61. Under the said rules if the Court is satisfied that the claimant is in possession of the property on his own account the property is to be released from attachment. But if it is shown that the property is in the possession of the claimant on account of the judgment-debtor or in the possession of the judgment-debtor in his own account but not in trust for another the property is not to be released from attachment. Though in the claim proceedings the question to be determined by the Court is one of possession it is dependent upon the title of the claimant, independent of the title of the judgment-debtor. Thus it will be seen that we cannot entirely divorce the question of title from possession. It may even be the possession of a trespasser can be sustained because it will be possessory title hostile to that of the judgment-debtor. (Vide *Ramasami Chettiar* v. *Mallappa Reddiar*[1].) As

1. (1920) 39 M.L.J. 350: I.L.R. 43 Mad. 760 at 778 and 779 (F.B.).

Bavamma v. Papanna.

observed by Rankin, J., in *Najimunnessa Bibi* v. *Nacharuddin Sardar*[1]:

"It is impossible to separate altogether the question of possession and of title. Thus, if the judgment-debtor was in possession, he may have been in possession as agent or trustee for another, and this has to be enquired into. . . . To that extent, the title may be part of the enquiry in a claim case".

If therefore it be shown that the claimant has no title independent of the title of the judgment-debtor—he will fail because the possession which he seeks to maintain cannot be possession on his own account. In *Nga Tha Yah* v. *F. N. Burn*[2], in construing S. 246 of Act VIII of 1869 corresponding to O. 21, rr. 58 to 63, Civil Procedure Code, Sir Barnes Peacock, C J., observed:

"The claimant would not have a right to interfere unless he proved that they (the goods) belong to him or were in his possession",

at p. 99

"Possession being *prima facie* evidence they were his property".

When a suit is instituted under O. 21, r. 63 it is not merely a continuation of the claim proceeding, but what is essentially litigated is a question of title. For example, it may be the claimant in the claim proceedings would have succeeded by merely showing that he was a trespasser but the decree-holder can establish in a suit which he files under O. 21, r. 63 that the trespass was not of sufficient duration to confer any title in the successful claimant and the property still belonged to the judgment-debtor and that therefore he is entitled to attach the property as that of the judgment-debtor. (Vide *Ramasami Chettiar* v. *Mallappa Reddiar*[3].) As observed by Wallace, J., in *Donepudi Subramanyam* v. *Nune Narasimham*[4]:

"The claim enquiry merely settles whether the claimant is in possession of the property in his own behalf or on behalf of the judgment-debtor. But the claimant in his suit has to establish right which he claims to the property, that is, the question of title, is also raised for decision. The suit is therefore really in part a new legal proceeding, and is not entirely restricted to the questions within the scope of the claim enquiry".

No doubt the words 'to establish the right' may enable the plaintiff to claim a larger relief than a mere declaration of title but it certainly does indicate that what the plaintiff has to establish is his title to the property in dispute. That this is the true view seems to be clear from the observations of the

---

1. (1923) I.L.R. 51 Cal. 548 at 557. 2. (1868) 2 Beng.L.R. 91 (F.B.).
3. (1920) 39 M.L.J. 350: I.L.R. 43 Mad. 760 at 779 (F.B.).
4. (1928) 56 M.L.J. 489.

Judicial Committee in *Sardhari Lal* v. *Ambika Pershad*[1]:

"A suit may be brought to claim the property, notwithstanding the order, but the law of limitation says that the plaintiff must be prompt in bringing the suit. The policy of the Act evidently is to secure the speedy settlement of questions of title raised at execution sales".

Considerable insistence was placed by Mr. Y. Suryanarayana on the observations of Madhavan Nair, J., in *Pakirayya* v. *Kamasastri*[2], which seems to lend colour to his contention that it may not be incumbent upon the plaintiff to establish his title to the property unless he himself seeks a declaration of title thereto. What happened in that case was, a question of title was raised and the learned Judge observed that the Lower Court was right in determining that question as evidence in regard thereto was adduced. It is not authority for the proposition that a claimant before he can get relief is not bound to establish his title to the property and he can succeed by merely saying that the order of attachment was not properly made. Whatever Madhavan Nair, J., may have intended to lay down in the said decision, his later judgment in *Venkayya* v. *Raghavayya*[3], does not support Mr. Suryanarayana. In that case the learned Judge makes the following observation at p. 592:

"This Court had held in *Pakirayya* v. *Kamasastri*[2] that the terms of O. 21, r. 63 are wide enough to include a suit based upon title. The point to be observed is that the rule does not specifically say either that it is possession on the date of the claim proceedings that should be established or that it is the title of the claimant that should be established. The words are 'the claimant may institute a suit to establish the right which he claims to the property in dispute'. In order to prove that he has right to the property in dispute a consideration of his title as well as of possession will be relevant. The two questions cannot be separated one from the other, for, in finding out who is in possession of the property, the question as to who has title to it will be very relevant because ordinarily possession will follow title".

This observation clearly supports the view which I have taken that it is incumbent upon the plaintiff to establish his title to the property before he can get the relief he wants, namely, the release of the property from attachment. This appeal therefore fails and is dismissed with costs. Leave refused.

S. V. V. — *Appeal dismissed.*

1. (1888) L.R. 15 I.A. 123: I.L.R. 15 Cal. 521 at 526 (P.C.).
2. A.I.R. 1933 Mad. 328 at 329.
3. (1935) 68 M.L.J. 590.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Ordinary Original Civil Jurisdiction.]

PRESENT:—MR. JUSTICE GENTLE.

P. Ramanujiah, Sole Proprietor of P. Thiruvengadiah & Son carrying on business at 172, Devaraja Mudali Street, Park Town, Madras .. *Applicant**

v.

The Commissioner, Corporation of Madras .. *Respondent.*

Ramanujiah *v.* The Commissioner, Corporation of Madras.

Madras City Municipal Act (IV of 1919), S. 98 (f)—"Timber"—Whether includes plywood—Liability of manufactured article to taxation—Madras Act (X of 1936), S. 77—Revenue and penal legislation—Strict construction.

Plywood is a manufactured article made from wood and is not included in the word "timber" in clause (*f*) of S. 98 of the Madras City Municipal Act, 1919, for purposes of levy of tax by the Corporation of Madras.

The provisions of S. 98 of the Madras City Municipal Act, 1919, and S. 77 of Madras Act (X of 1936) are tantamount to revenue legislation. Before the Corporation is entitled to recover tax under those provisions it must be fully established that the article they propose to tax is one coming under the sections, and those sections should be construed strictly as they constitute revenue and penal legislation.

C. Veeraraghava Aiyar and *T. P. Ramachandra Aiyar* for Applicant.

T. M. Krishnaswamy Aiyar and *V. Rajagopala Mudaliar* for Respondent.

The Court delivered the following

JUDGMENT.—The matter which is for consideration here and which I have to decide is whether a commodity known as plywood is timber within the meaning of S. 98 of the Madras City Municipal Act of 1919. The relevant passages in that section are as follows:—

"The Corporation may levy (*f*) a tax on timber brought into the City."

S. 129 of that Act has been repealed and there is substituted for it the provisions of S. 77 of the Madras Act No. X of 1936. The relevant passages of the latter section are as follows:—

" (1) If the Council by a resolution determines that a tax shall be levied on timber brought into the City, such tax shall be levied at such rates not exceeding Rs. 5 per ton and in such manner as may be determined by the Council.

(2) No timber shall . . . . be brought into the City unless the tax due thereon has been paid.

---

* Application No. 1826 of 1936. 29th September, 1936.

Ramanujiah *v.* The Commissioner, Corporation of Madras.

(3) The tax shall be levied on timber kept within the City for sale if the Commissioner has reason to believe that the tax if any due thereon has not been paid, provided that the tax shall not be levied if the person keeping the timber for sale produces satisfactory proof of the previous payment of the tax thereon.

(4) The Commissioner may call for the accounts of any person keeping timber for sale for the purpose of levying the tax under sub-S. (3).

(5) If the Commissioner is satisfied that any person has wilfully evaded the payment of any tax leviable under this section, the Commissioner may direct that such person shall in addition to such tax pay by way of penalty a sum not exceeding the amount of such tax. Such penalty shall be recoverable in the same manner as the tax."

The provisions of these two statutes give to the Corporation somewhat autocratic powers. They may levy a tax not exceeding Rs. 5 a ton upon timber brought into the City. The Corporation can prevent timber upon which a tax has not been paid from being brought into the City. Then one comes to the powers of the Commissioner; if he has reason to believe that timber is kept for sale within the City and that that timber has not been the subject of the payment of tax, he may levy the tax and the onus is cast upon the tax-payer or the person keeping the timber for sale to show that in fact the tax which is demanded has been paid. The Commissioner in respect of the matter I have just mentioned is entitled to call for accounts of the person keeping the timber for the purpose of levying the tax upon it. And then finally if the Commissioner is satisfied that any person has wilfully evaded the payment of tax upon timber brought into the City, he may direct that in addition to the tax which is to be paid a penalty of a sum equivalent to the amount of tax shall also be paid by the person having this timber in his possession. From their nature the provisions of these two sections are tantamount to revenue legislation; and the last provision, namely, requiring payment of double the amount of tax in the case of wilful avoidance is penal legislation. Before the Corporation is entitled to recover tax under these provisions it must be fully established that the article they propose to tax is one coming under the heading of timber within S. 98 and these statutes so far as they are relevant here must be construed strictly. It is a revenue and a penal legislation. I was informed by the learned Counsel on behalf of the parties that there is no decided case and no authority in any Law Report which in any way deals with this matter; and unfortunately neither of the statutes which I have mentioned provides a definition for the word 'timber' within the meaning

Ramanujiah *v.* The Commissioner, Corporation of Madras.

of these Acts. One must therefore in effect dogmatise upon this matter. In my judgment, the commodity known as plywood is not timber within the meaning of either of these statutes, that is to say, it is not timber which is taxable by virtue of the provisions of sub-cl. (*f*) of S. 98 of the Act of 1919. The intention in my opinion of the Legislature was to authorise the imposition of taxation upon raw material, that is to say, wood in respect of which no process of a manufacturing nature has been applied. Some process such as cutting or shaping for transport convenience and the purpose of preparing the rough timber into convenient sizes suitable for commercial or workshop uses must be contemplated because it is certainly most unusual to transport trees or the trunks or branches of trees in the condition in which they are hewn in the forest. But if the Legislature had intended to authorise the Corporation of Madras to inflict taxation upon timber or an article of timber in respect of which a manufacturing or workshop process in the ordinary acceptation of the term had been applied, it would and must have said so. In the absence of any precise enactment that a manufactured article or commodity is to be taxed it is not taxable. It is conceded by Mr. Krishnaswami Iyer on behalf of the Corporation that an article which is a finished article such as a chair, table or carving, although made entirely of wood or timber, is not an article which is the subject of taxation by the Corporation under S. 98. The expression 'plywood' is not used in the same way as one uses the expression 'Oakwood', 'Teakwood' and 'Elmwood'. These expressions indicate the nature of the origin of the wood. There is not tree known as ply but there are teak, oak and elm trees. Plywood in my view is nothing more or less than a manufactured article made from wood or timber in the same way that the chair and table which I mentioned are also manufactured from the same commodity. The method by which plywood is manufactured, I am informed,—and there is no dispute about it—is this. First of all the tree trunks are obtained and the whole trunk cut into convenient lengths. The bark having been stripped off, the wood is boiled. After boiling it is placed latitudinally in a machine in the workshop and caused to rotate upon the axis running through the centre of the log. When rotating the trunk, the wood is cut and peeled into strips of very thin sheeting much in the same way as one unrolls a roll of white tape. These long strips or sheets are then subjected to a

further process. The finished plywood varies in thickness from a minimum of three layers to a maximum of 7 or 8 layers or strips. The long strip or sheet obtained from the log is known as veneer. Firstly, there is a sheet of veneer laid with the grain in one direction. The next sheet of veneer is then laid with the grain parallel to the first veneer and these two sheets or veneers are joined together by glue and with the glue there appears to be another sheet or strip of thin wood the grain of which is placed at right angles to the grain of the two pieces of veneer. Therefore one has first of all the strip of veneer with the grain running for example from east to west, then next to that another strip of some wooden material, the grain of which runs at right angles, that is to say, north and south, and then comes the next sheet of veneer, the grain of which is running parallel to the grain of the sheet of veneer on the other side of this cross sheet of wood. Thus by alternating a sheet of veneer with a sheet of cross grain material and glue to attach the veneer sheets together one has plywood manufactured. I have had shown to me samples of plywood. The largest thickness so far as I can see is one of eight strips altogether including cross or adhesive strips. This plywood having been made in this way is then cut into planks of size of either 6 feet by 5 feet or 5 feet by 4 feet and it is in that size it is sold. Incidentally it is not without interest to consider that except perhaps for vast trees in some South American forests one would never find planks of the width of the ones in which plywood is made. This process is more than cutting, fashioning or the shaping of the raw tree for the purpose of transport or making it into convenient sizes for the workshop or for the use of the artisan. It is a complicated method of manufacture requiring a degree of skill and no doubt an amount of time. The finished article is not, in my view, anything other than a manufactured commodity. When one again turns to sub-S. (1) of S. 77 of the Act of 1936 one there finds that the duty imposed is to be not more than Rs. 5 a ton. Therefore the material upon which the tax is to be imposed has to be weighed and it is by the weight of the timber that the Corporation are entitled to collect this tax. There must be a considerable amount of skill used in the manufacture of plywood, the weight of which is made up partly by wood and partly by glue. If plywood were timber within the meaning of S. 98 then the Corporation would be taxing glue at the rate of

Ramanujiah v. The Commissioner, Corporation of Madras.

not more than Rs. 5 a ton. S. 98 empowers them only to tax timber, not to tax glue; glue is manufactured from the hoof of an animal or may be from some vegetable. This fact supports the contention that plywood is not timber within the meaning of the above section. In common parlance when one speaks of plywood one does not convey to the hearer, timber in the raw state, whether it be in the trunk or the joist or the plank. It conveys the result of workmanship and skill in the factory. One has seen in several dictionaries a definition of timber. One definition says " building materials of all kinds." It has never been suggested that tiles slates, iron stauntions and glasses are timber and that definition does not help. In the 1934 Concise Oxford Dictionary a definition of plywood is given. Plywood is there defined as "a straight thin board made by glueing layers with the grains cross-wise." For the reasons I have given, in my judgment the word 'timber' in S. 98 of the Act of 1919 does not include such an article or commodity as plywood. Plywood, a manufactured article is outside the contemplation of that section and for that reason in my view the Corporation have not powers under the statutes I have mentioned to tax plywood which is being brought into this City. The result of my finding is that there will be an order that the Commissioner of the Corporation of Madras will forbear from levying and collecting a tax upon the consignment of eleven bundles of plywood belonging to the petitioner Mr. P. Ramanujiah and which arrived in Madras on the 6th August 1936 by the Steamship 'Simla' and further there will be an order that the Commissioner will forbear from either preventing the import into the City by the petitioner of plywood or attempting to levy any tax upon plywood which he either brings or has brought within the City of Madras. This rule is therefore made absolute with taxed costs for two Counsels.

B.V.V. *Order made.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATARAMANA RAO.

Hajee Moosa Sait and Brothers thro' its managing partner Abdulla Salai Muhammed Sait .. *Petitioner** (*Plaintiff*)

v.

P. S. P. Abdul Karim .. *Respondent* (*2nd Defendant*).

Hajee Moosa Sait & Brothers *v.* Abdul Karim.

Surety—Contract of—Letter of surety stating his willingness to be bound to the extent of Rs. 250 for transaction up to a year—Value of goods supplied exceeding the sum fixed in the letter of guarantee—Whether surety discharged on account of the amount exceeding the stated figure—Limit how far effective.

Where a surety was sought to be made liable in virtue of a letter of guarantee executed by him in plaintiff's favour which stated, "please supply the bearer of this letter, *S*, goods in current account up to the extent of Rs. 250 (Rupees Two hundred and fifty) and have debit and credit transactions in his name. For the said sum I shall be surety for a period of one year. Thereafter I shall not be surety", and in the period of one year during which the guarantee was to subsist the defendant was supplied goods on four occasions whose total value exceeded Rs. 250 and hence the surety raised the plea that as the plaintiff had exceeded the limit indicated by him in his letter of guarantee there was a variation of the terms of the contract entered into with him and he was therefore discharged from all liability thereunder.

Held, (1) that following the principle laid down in *Parker* v. *Wise*, (1817) 6 M. & S. 239: 105 E.R. 1232; *Gordon* v. *Rae*, (1858) 8 El. & Bl. 1065: 120 E.R. 396 at 405 and *Laurie* v. *Scholefield*, (1869) L.R. 4 C.P. 622, there had been no variation of the engagement by reason of the fact that goods of the value of more than Rs. 250 were supplied to the defendant and the surety was not therefore discharged from his liability to that extent.

On a construction of the document as a whole the reasonable intendment of the parties seems to be to define the duration and limit of the surety and not to impose a limit on the supply of the goods. The words "up to the extent of Rs. 250" do not mean that once the goods of the said sum have been supplied no further goods should be given, because the debit and credit transaction were intended to go on, at least so far as the surety was concerned, for one year.

(2) But he was not bound to pay interest as there was no stipulation in the document to pay any interest nor had it been established in the case by any evidence that the dealings carried or were intended to carry interest.

Petition under S. 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the District Munsiff of Madura Town, dated the 12th day of March, 1935, and passed in S. C. Suit No. 2806 of 1934.

---

*C.R.P. No. 656 of 1935. 26th October, 1936.

Hajee Moosa Sait & Brothers *v.* Abdul Karim.

K. Rajah Aiyar, S. Venkatakrishnan and *S. L. Narasimham* for Petitioner.

V. Meenakshisundaram for Respondent.

The Court delivered the following

JUDGMENT.—This Civil Revision Petition arises out of a suit instituted by the plaintiff to recover a sum of Rs. 256-1-6, being the amount due in respect of goods supplied to the first defendant between the 17th December, 1931, and 31st December, 1932. The 2nd defendant was sought to be made liable as surety in virtue of a letter of guarantee executed by him in plaintiff's favour dated 16th December, 1931, which runs thus:

"Letter of surety regarding supply of goods. 16th December, 1931.
Kandramanickam, P.C.P. Madura.
Haji Musa Sait and Brothers
1st Margali Prajorpathi year
(16th December, 1931)
Karim writes as follows:—

Please supply the bearer of this letter S. Shamsuddin Sahib Avergal of Tirupathur, goods in current account 'up to the extent of Rs. 250 (Rupees Two hundred and fifty), and have debit and credit transactions in his name. "For the said amount I shall be surety for a period of one year. Thereafter I shall not be surety. If any amount be due to you within the aforesaid period of one year during which I shall be surety, I shall pay the same and take this letter. After one year I shall not be surety.

With compliments.

Nayan's help
(Sd.) P. C. P. Abdul Karim."

During the period of one year during which the guarantee was to subsist the first defendant was supplied goods on four occasions and on two of such goods of the value of more than Rs. 250 were supplied. The plea of the second defendant is that as the plaintiff exceeded the limit indicated by him in his said letter there was a variation of the terms of the contract entered into with him and he was therefore discharged from all liability thereunder. This plea prevailed in the Court below.

The question is whether it is sound. No doubt as pointed out by Lord Atkin in *Seth Pratap Singh* v. *Keshavlal*[1]:

"the surety like any other contracting party, cannot be held bound to something for which he has not contracted".

And he refers to the observations of Lord Westbury in

1. (1934) 68 M.L.J. 339: L.R. 62 I.A. 23: I.L.R. 59 Bom. 180 (P.C.).

Hajee Moosa Sait & Brothers v. Abdul Karim.

Blest v. *Brown*[1], namely:

"He (surety) is bound therefore merely according to the proper meaning and effect of the written engagement that he has entered into. If that written engagement is altered in a single line, no matter whether it be altered for his benefit no matter whether the alteration be, innocently made, he has a right to say, 'The contract is no longer that for which I engaged to be surety; you have put an end to the contract that I guaranteed, and my obligation therefore is at an end'."

The question therefore is, what is the meaning and scope of the Ex. C in this case? On a construction of the document as a whole the reasonable intendment of the parties seems to be to define the duration and limit of the liability of the second defendant and not to impose a limit on the supply of goods. The words "up to the extent of Rs. 250" do not mean that, once the goods of the said value have been supplied no further goods should be given because the debit and credit transactions were intended to go on at least so far as the second defendant was concerned for one year. Therefore, the words "up to the extent of Rs. 250" must be construed in relation to what follows, namely, "for the said amount I shall be surety for a period of one year", thereby plainly indicating that the extent of the second defendant's liability is limited to the said amount. Ex. I is merely a request to the plaintiff by the second defendant to supply goods to the extent of Rs. 250 without any restraint upon his advancing more but with a condition on his part that he is answerable to that extent only. The case in *Parker* v. *Wise*[2] is instructive. In that case *A* had overdrawn his account with his bankers in a sum of £4,822-15-9 and in order to enable him the better to carry on his business requested the bankers to allow him to overdraw his account at any time and from time to time such further sums as he might require so as that the same sum together with the said sum £4,822-15-9 should not exceed as a whole at any time the sum of £5,000. The bankers agreed provided they were indemnified by the bond of a surety, and the defendant in that case stood surety as required by the bankers and the condition of the said surety bond was for the payment by *A* and the surety on demand to the bankers of the sum of £4,824-4-9 due to them and also such further sum or sums as the bankers may thereafter advance to *A* in the course of his business, not exceeding on the whole £5,000. In a suit on the bond the plea raised by the surety was

1. (1862) 4 De G. F. and J. 367 at 376: 45 E.R. 1225.
2. (1817) 6 M. and S. 239: 105 E.R. 1232.

Hajee Moosa Sait & Brothers *v.* Abdul Karim.

that on diverse days the bankers allowed *A* to overdraw his account to such an amount that the further sums advanced together with the said sum of £4,822-15-9 exceeded in the whole at one time £5,000 contrary to the said condition and therefore he was discharged from his obligation under the bond. This plea was negatived and Bailey, J., observed:

" If the true construction be that the parties intended to stipulate against any advance beyond £5,000 then this advance will have the effect of cutting down the obligation altogether. But the Court ought to see plainly that this was the intention, before they give a construction to the language of this bond which would have the effect of avoiding it if one shilling beyond the sum named should be advanced" . . . " If the parties had intended to attach a consequence so penal to an advance beyond that sum, can it be supposed that they would have contented themselves with language so equivocal, and would not have introduced express words of condition as it were by way of caution, that such should be the effect"?

In *Gordon* v. *Roe*[1], Crompton, J., followed *Parker* v. *Wise*[2], and explained its scope thus:

" Even if there had been a recital that the agreement had been to give credit for the £1,000 and the condition was for securing £1,C00, it is well established by the judgment of the learned Judges in *Parker* v. *Wise*[2], that unless the bond clearly showed that the parties intended that the restriction was to operate as a condition upon which the whole security was to become void, the advancing to a greater amount would be no defence".

I may also usefully refer to the case of *Laurie* v. *Scholefield*[3], which is almost on all fours with the present case. In that case at the commencement of the dealings a letter of guarantee was given in the following form:

" In consideration of the Union Bank of London agreeing to advance and advancing to the firm of Russel & Co., any sum or sums of money they may require during the next eighteen months, not exceeding in the whole the sum of £1,000 we hereby jointly and severally guarantee the payment of any such sum as may be owing to the said bank at the expiration of the said period of eighteen months, and undertake to pay the same on demand in the event of Russel & Co., making default in the payment of the same".

The contention in that case was relying on the words not exceeding in the whole the sum of £1,000 that the bankers during the period of eighteen months specified in the document made advances greatly exceeding in the whole £1,000 and therefore the surety was discharged from the liability and guarantee. Montague Smith, J., did not accept this contention and he remarked:

" The words not exceeding in the whole £1,000 do not amount to a condi-

1. (1858) 8 El. and Bl. 1065: 120 E.R. 396 at 405.
2. (1817) 6 M. and S. 239: 105 E.R. 1232.
3. (1869) L.R. 4 C. P. 622.

Hajee Moosa Sait & Brothers v. Abdul Karim.

tion. They were intended to express the limit of the defendant's liability, and not to prohibit the bank from making any further advances to Russel & Co. If it had been intended that no advances beyond £1,000 should be made during the currency of the suretyship, I should have expected more precise words".

Following the principle laid down in the above decisions I hold that there has been no variation of the engagement in Ex. C by reason of the fact that goods of the value of more than Rs. 250 were supplied to the first defendant and the second defendant is not discharged from his liability thereunder. He is liable under Ex. 1 to pay to the plaintiff the value of the goods supplied to the first defendant to the extent of Rs. 250 during the year in question. But he is not bound to pay his interest as there is no stipulation in the document to pay any interest, nor has it been established in the case by any evidence that the dealings carried or were intended to carry interest.

I therefore reverse the decree of the lower Court and pass a decree for Rs. 188 with interest at 6 per cent. against the second defendant. In the circumstances of the case I direct each party bear his own costs throughout.

K.C. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATASUBBA RAO AND MR. JUSTICE VENKATRAMANA RAO.

Koti Viswanatham .. *Appellant**

v.

Pandiri Satyanandam and others .. *Respondents (Respondents 1 to 4, 6, 8 and 9).*

Viswanatham v. Satyanandam.

Civil Procedure Code (V of 1908), O. 33, rr. 5 and 9—Leave to appeal in forma pauperis*—Transfer of interest in subject-matter of suit by the applicant to another—Transfer even earlier than lower court's decision against him —Whether leave was properly refused.*

The principle underlying O. 33, r. 5, Civil Procedure Code, is that a person ought not to be allowed to sue *in forma pauperis* after transferring to a third party his interest in the property involved in the suit, no matter for what reason the transfer has been made. In other words, as observed in *Hanifa Bai* v. *Haji Siddick Bui Meanji Sait,* (1906) 17 M.L.J. 447: I.L.R. 30 Mad. 547 (where this question was not raised), the question would be, whether at the date of the institution of the suit, there was a subsisting agreement falling within the provision.

Bai Chandaba v. *Kuver Saheb Bapu Saheb,* (1893) I.L.R. 18 Bom. 464; *Mansa Puri* v. *Harbaghat Puri,* (1916) 37 I.C. 172 and *Abdul Jabbar* v. *Samu Bibi,* A.I.R. 1934 Cal. 740, dissented from.

* L. P. A. No. 20 of 1936. 23rd October, 1936.

Viswanatham *v.* Satyanandam.

It is difficult to bel'eve that r. 5 embodies a different principle from r. 9, the object of both being to produce the same result.

Where the plaintiff claimed by virtue of an agreement with some defendants, some logs of wood, and the fifth defendant alleged that they belonged to him and had been transferred to the sixth defendant and the lower Court found against both and decreed in favour of plaintiff, and the fifth defendant therefore applied for leave to appeal *in forma pauperis* but pending action the fifth defendant reciting that some monies were due to sixth defendant from himself had transferred to him such interest that he alleged he had possessed in the sale proceeds of the timber, though the transfer was not made with reference to the appeal, having been effected before even the first Court's judgment,

Held, that the provision of law which governed the question was O. 33, r. 5 and therefore the application for leave to appeal was rightly refused by the lower Court.

Appeal under cl. 15 of the Letters Patent against the order of the Hon'ble Mr. Justice Burn dated 3rd February, 1936 and made in C. M. P. No. 4696 of 1934 petition presented to the High Court for leave to appeal *in forma pauperis* against the decree of the Court of the Subordinate Judge of Rajahmundry in O. S. No. 62 of 1926.

M. S. Ramachandra Rao for Appellant.

G. Lakshmanna for Respondents.

The judgment of the Court was delivered by

Venkatasubba Rao, J.

Venkatasubba Rao, J.—This is a Letters Patent Appeal from the order of Burn, J., refusing leave to the appellant to file his appeal *in forma pauperis.* The facts, so far as they are relevant, may be shortly stated. The suit related to certain logs of timber, which the plaintiff claimed by virtue of an agreement with the first set of defendants. The fifth defendant was the rival claimant, who alleged that the logs belonged to him and had been transferred to the sixth defendant. The lower Court negatived the claim of the fifth and sixth defendants and decreed the plaintiff's suit. The applicant before Burn, J., was the fifth defendant, who applied for leave to file the appeal *in forma pauperis.* Pending the action, the logs were sold and the sale proceeds were brought into Court and the fifth defendant, reciting that some monies were due from him to the sixth, transferred to him such interest as he possessed in the proceeds. The point to note is that the transfer was not made with reference to any intended appeal, having been effected, as stated above, even before the judgment was delivered by the Court below.

The provision of law which governs the question is O. 33, r. 5, Civil Procedure Code (the provisions of O. 33, being

Viswanatham v. Satyanandam.

Venkatasubba Rao, J.

applicable by virtue of O. 44, r. 1 to appeals also) which runs thus:

"The Court shall reject an application for permission to sue as a pauper.

(*e*) Where he has entered into any agreement with reference to the subject-matter of the proposed suit under which any other person has obtained an interest in such subject-matter."

It is contended for the appellant that the agreement referred to here must be of a champertous character, the idea being that the provision is aimed against bargains tending to promote litigation, such bargains being immoral in a legal sense. First, it must be pointed out that the English Law in regard to champerty and maintenance does not apply in India, for, it has been laid down that an agreement being champertous is not of itself sufficient to render it void, but must be shown, in addition, to be contrary to public policy. Further, it is to prevent payment of court-fee being evaded, that this provision has been enacted, and it matters little therefore with what purpose the agreement has been entered into; whether it is an honest or *bona fide* one or of an improper character, seems an irrelevant factor, quite outside the scope of the enquiry. There is no need to read into the section the suggested limitation, which does not find a place there. The principle underlying the provision is that a person ought not to be allowed to sue *in forma pauperis* after transferring to a third party his interest in the property involved in the suit, no matter for what reason the transfer has been made. In other words, as was observed in *Hanifa Bai* v. *Haji Siddick Bui Meanji Sait*[1] (where, however, this point was not raised or considered), the question would be, whether at the date of the institution of the suit, there was a subsisting agreement falling within the provision. In one case in Bombay, one in Allahabad and one in Calcutta a different view has been taken without much discussion (*Bai Chandaba* v. *Kuver Saheb Bapu Saheb*[2], *Mansa Puri* v. *Harbaghat Puri*[3] and *Abdul Jabbar* v. *Sanu Bibi*[4]). But with great respect we are unable to agree with these decisions.

It is next contended that the agreement here does not offend against the provision, as it was not made in view of the intended appeal. The argument is, that from the use of the

1. (1906) 17 M.L.J. 447: I.L.R. 30 Mad. 547.
2. (1893) I.L.R. 18 Bom. 464.
3. (1916) 37 I.C. 172.
4. A.I.R. 1934 Cal. 740.

Viswanatham v. Satyanandam. — Venkatasubba Rao, J.

word "proposed" it should be inferred, that what the section refers to, is an agreement the party enters into, having the suit in contemplation. That does not appear to be the natural meaning of the words. Is there an agreement or not referring to the subject-matter of the proposed suit?—that is the only question, and there is no warrant for assuming that the agreement should be one made with reference to or in view of the intended suit. R. 9, which relates to the dispaupering of the plaintiff, throws some light on the question. Under that rule, for a plaintiff being dispaupered, all that need be shown is, that he has entered into an agreement of the character described, with reference to the subject-matter of the suit, and it is noticeable that the word "proposed" does not occur there. It is difficult to believe that R. 5 embodies a different principle from R. 9, the object of both the rules being to produce the same result. In the Allahabad case mentioned above (*Mansa Puri* v. *Harbaghat Puri*[1], the learned Judges adopted the construction of the word "proposed" now contended for; they seem to have arrived at the result by holding that if the agreement was to be champertous, it would necessarily be with reference to the suit in contemplation. As already stated, we are unable to agree with this view.

Leave to appeal *in forma pauperis* has therefore been rightly refused.

The question then remains, whether the learned Judge's order refusing to give the appellant time to pay the requisite court-fee, can be upheld. That the Court has power under S. 149, Civil Procedure Code, to grant such time, cannot be disputed. We have carefully gone through the facts and it has not been shown that there was want of *bona fides* on the part of the appellant; nor can it be suggested that the party who ought to have filed the appeal was the sixth defendant, the transferee, and not the fifth. The parties might reasonably have thought that the findings against the sixth defendant could not be successfully attacked in appeal, but that so far as the fifth defendant was concerned, the point he could urge was altogether different. We are therefore of the opinion that the appellant ought to have been given time for payment of the court-fee; four days' time is accordingly granted from this date.

---

1. (1916) 37 I.C. 172.

Viswanatham v. Satyanandam. — Venkatasubba Rao, J.

Mr. Lakshmanna for the respondent suggests that our order may work hardship upon him unless one of two courses is adopted, either the sixth defendant should be brought on the record as appellant, or the respondent should be allowed to apply for security for costs. Mr. M. S. Ramachandra Rao for the appellant believes that the sixth defendant may be willing to come on the record as an appellant. If such an application is made, it will be allowed; if not, Mr. Lakshmanna will be at liberty to apply for security for costs. When applications are made in this behalf, they shall be posted before this Bench.

We direct the appellant to pay Rs. 103 (the costs awarded by the order under appeal) to Mr. Lakshmanna in one month from this date. If default is made, it will be treated as equivalent to failure to comply with an order for security for costs and the respondent will be at liberty to take appropriate steps.

We make no order as to costs in this appeal.

K. C. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE CORNISH.

Venkataswamy Naicken, minor by next friend Kaveti Naicken .. *Appellant** (*1st Respondent*)

v.

The Secretary of State for India in Council represented by the Collector of Coimbatore and others .. *Respondents* (*Petitioner and Respondents Nos. 2 to 7*).

Venkataswamy Naicken v. The Secretary of State for India in Council.

Civil Procedure Code (V of 1908), O. 33, rr. 11 and 12—Pauper suit by minor represented by next friend—Disposal by Court—Order directing next friend to pay costs of suit—Application by Government to direct plaintiff to pay court-fee—Maintainability.

The Court may, in disposing of a pauper suit, direct the next friend of the pauper plaintiff to pay the costs of the suit, but such an order will not deprive the Government of the right which is expressly given to it under O. 33, rr. 11 and 12, Civil Procedure Code, to apply for an order that the pauper plaintiff shall pay the court-fee payable on the plaint.

Elumalai Naicker v. *Kuppammal*, (1929) 58 M.L.J. 623: I.L.R. 53 Mad. 716, considered.

---

* A. A. A. O. No. 20 of 1934. 22nd September, 1936.

Venkata-swamy Naicken *v.* The Secretary of State for India in Council.

Appeal against the order of the District Court of Coimbatore dated the 3rd day of August, 1933 and made in A. S. No. 36 of 1933 preferred against the order of the Court of the Subordinate Judge of Coimbatore in I. A. No. 522 of 1931 in O. S. No. 38 of 1930.

V. C. Veeraraghavachari for Appellant.

The Government Pleader (K. S. Krishnaswami Aiyangar) for Respondents.

The Court delivered the following

JUDGMENT.—The appellant, a minor, with his mother as next friend, brought a suit *in forma pauperis* against his father for a partition. The suit ended in a compromise whereby the suit was withdrawn. The compromise, however, provided that the next friend should pay the court-fee. The compromise was approved by the Court, but beyond that no order was made by the Court touching the payment of the court-fee. The next friend apparently has no means to pay the court-fee, and there seems some force in the suggestion that the compromise arrangement on this matter was a device to save the plaintiff from the liability.

O. 33, r. 11 provides that where the plaintiff fails in the suit—as he did in the present instance—the Court shall order the plaintiff, or any person added as a co-plaintiff to the suit, to pay the court-fees which would have been paid by the plaintiff if he had not been permitted to sue as a pauper. The Court which sanctioned the compromise having made no order under r. 11 the Government applied under r. 12 for an order. This rule says that the Government shall have the right at any time to apply to the Court to make an order for the payment of court-fees under r. 11. The Government did so apply, and the Sub-Judge purporting to act upon the analogy of O. 32, r. 14 ordered that the court-fee should be paid by the next friend. On appeal this order was reversed by the District Judge who held that O. 33, r. 11 was mandatory.

The learned Advocate for the appellant has relied upon *Elumalai Naicker* v. *Kuppammal*[1]. In this case it was held that S. 35 and O. 33, r. 11 are to be read together and that the Court under the general power conferred upon it by the section over costs can order a next friend to bear the costs of a pauper suit including the court-fee. It was not decided in that case,

1. (1929) 58 M.L.J. 623: I.L.R. 53 Mad. 716.

Venkataswamy Naicken v. The Secretary of State for India in Council.

and indeed the question did not arise for decision, that the Court in its discretion could make such an order when Government made an application to the Court under r. 12 to make an order under r. 11. It must be borne in mind that the discretion given to the Court over costs is made by S. 35 "subject to such conditions and limitations as may be prescribed", which clearly includes any limitation prescribed in other parts of the Code. I think it would not be competent to Government if it thought there was a better prospect of recovering the court-fee from the next friend, who might be a person of property, than from the pauper plaintiff, to apply under r. 12 for an order making the next friend pay the court-fee. The obvious answer to the application would be that it was not an order which the Court could make under the terms of r. 11. It seems to me that upon such an application the power of the Court to make an order that some person other than the plaintiff or a co-plaintiff shall pay the court-fee is equally negatived by the language of r. 11. It has been argued that this restriction of the Court's power is contrary to the decision in *Elumalai Naicker* v. *Kuppammal*[1], which of course is binding upon me and to which I happened to be a party. I do not think so. The decision did not profess to dispose of the question which is now before me. The Court may direct the next friend to pay costs in a pauper suit, as in an ordinary suit, and if the Government is content with such an order as regards its right to recover the court-fee no question can arise. But I am of opinion that the Court cannot by such on order deprive the Government of the right which is expressly given by rr. 11 and 12 of O. 33 to have an order that plaintiff shall pay the court-fee when a pauper suit fails. For these reasons I think that the appeal fails. It is dismissed with costs.

Leave refused.

B. V. V. —— *Appeal dismissed.*

---

1. (1929) 58 M.L.J. 623: I.L.R. 53 Mad. 716.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE MOCKETT.

Elukuri Seshapani Chetty .. *Petitioner**

v.

Emperor .. *Respondent.*

Seshapani Chetty *v.* Emperor.

Penal Code (XLV of 1860), S. 266—Essentials of offence under—Knowledge as to weight being false—Proof—Statement of accused made before Magistrate—Evidence Act (I of 1872), S. 25—Investigation of one crime—Confession regarding different crime—Admissibility in evidence.

In order to sustain a conviction under S. 266, Indian Penal Code, the prosecution must prove not merely the possession by the accused of the false weight but also his knowledge that it was a false weight. The latter ingredient of the offence cannot be proved by reference to the statement made by the accused while he was being questioned by the Magistrate.

Mohideen Abdul Kadir v. *Emperor,* (1903) I.L.R. 27 Mad. 238, relied on.

A confession made to the police in the course of the investigation of a crime is inadmissible in evidence even though it relates to another crime.

Kodangi v. *Emperor,* (1931) 61 M.L.J. 860 and *Emperor* v. *Kangal Mali,* (1905) I.L.R. 41 Cal. 601, relied on.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Sub-Divisional Magistrate of Kurnool in Cr. App. No. 5 of 1936 presented against the judgment of the Court of the Stationary Sub-Magistrate of Kurnool in C.C. No. 553 of 1935.

Nugent Grant and *K. Srinivasa Rao* for Petitioner.

A. Narasimha Aiyar for *The Public Prosecutor* (*L. H. Bewes*) on behalf of the Crown.

The Court made the following

ORDER.—The petitioner has been convicted under S. 266, Indian Penal Code, for being in possession of a false weight knowing it to be false. The facts are slightly unusual. It appears that the police were investigating in Kurnool a case relating to the receipt of stolen goods. In the course of that investigation they went to the shop of the petitioner who is a shroff. They did not find any stolen goods but the cupboard was not wholly bare. In a tin which I think may be said to be in the possession of the petitioner was found a rupee which has been produced. While having the appearance of a single rupee it is in fact two sides of two rupees joined together and

---

*Cr.R.C. No. 220 of 1936. 16th October, 1936.
Cr.R.P. No. 202 of 1936.

Seshapani Chetty *v.* Emperor.

it weighs more than an ordinary rupee. In order to convict the petitioner the prosecution were bound to prove the possession of a false rupee known to be false and intended to be fraudulently used. They proved it as follows: Before the Magistrate the prosecution called as their principal witness the police officer who went to the petitioner's shop. He stated as follows: I have not the evidence before me but I am told that the evidence given corresponds to what was stated in the complaint. "I questioned him (petitioner) as to what the tin kept by his side contained and the accused told me that it contained rupees and other coins for his use in weighing the silver and gold purchased or sold by him. I opened the tin and found only the coins used for weighing as stated by the accused" (including the rupee). That and the production of the rupee were all the evidence against the petitioner at the stage when the evidence for the prosecution has been called and I think it is clear that at that stage the Magistrate should have dismissed the case because the all important ingredient, namely, that the petitioner knew the rupee to be false was not present. But the petitioner put in a statement in which he stated that two days before the police officer came to his shop the rupee had come into his hands and he knew it to be false. This statement was used to fill up the gap in the prosecution evidence which the prosecution themselves had not proved. With regard to this I have been referred to the decision of Sir Arnold White, C.J., in *Mohideen Abdul Kadir* v. *Emperor*[1]. In that case at the close of the case for the prosecution the all important element, namely, the publication of a defamatory statement had not been proved and was sought to be proved because an admission of it was contained in the accused's statement under S. 342, Criminal Procedure Code. That is a case exactly in point and I think on that ground this criminal revision case should succeed. It is quite clear that at the close of the evidence for the prosecution proof of "scienter" was lacking, an essential ingredient and the accused should have been discharged. Instead as in *Mohideen Abdul Kadir* v. *Emperor*[1], the evidence was supplied by questioning him.

But there is another ground to which I attach for greater importance. There is no doubt in my judgment that the statement made by the accused to the police officer should not have

1. (1903) I.L.R. 27 Mad. 238.

Seshapani Chetty *v.* Emperor.

been admitted in evidence because it is clearly a confession. The accused told him, he says, that the tin contained rupees and other coins for his use in weighing the silver and gold purchased or sold by him. The moment one of these is shown to be false it seems to me that that is a confession and not as the Public Prosecutor has argued a mere statement of fact. I respectfully agree with the statement as to what is a good test whether a communication to the police is a confession or a mere statement of fact contained in *Emperor* v. *Kangal Mali*[1]. The learned judges after distinguishing between admissions of fact and confessions of guilt go on to say:

> " In fact a useful test as to the admissibility of statements made to the police is to ascertain the purpose to which they are put by the prosecution. If the prosecution rely on the statements of the accused to the police as being true, then they may, and probably in many cases will, be found to amount to confessions. If, on the other hand, as in the case of the statements to which we have just referred, the statements of the accused are relied on not because of their truth but because of their falsity, they are admissible as admissions."

In my judgment this is clearly a confession as I have already said and as has been pointed out by Jackson, J., in *Kodangi* v. *Emperor*[2], a confession made to the police in the course of investigating crime *A* although it relates to another crime *B* is equally inadmissible. The whole spirit of S. 25 of the Indian Evidence Act is to exclude confessions to the police and the moment a statement is found to amount to a confession I do not think it matters in the slightest of what crime it is said to be a confession. A consideration of this case shows that this conviction rests on (1) a statement by the accused at a stage when there was no *prima facie* case against him, and (2) a confession to a police officer. By reason of these the grave infirmities in the prosecution case I am constrained to allow this criminal revision case.

The conviction and sentences are set aside and the fine, if collected, will be refunded.

B.V.V. —— *Conviction set aside.*

---

1. (1905) I.L.R. 41 Cal. 601, 612. 2. (1931) 61 M.L.J. 860.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE MOCKETT AND MR. JUSTICE LAKSHMANA RAO.

Dhoolipala Venkateswarulu .. *Petitioner**

v.

The District Election Officer, Kistna, The Inspector of Local Boards and Municipal Councils, Madras .. *Respondents.*

Venkateswarulu *v.* The District Election Officer, Kistna.

Elections—Rules for preparation of Electoral Rolls, rr. 12, 13 and 14—Effect of r. 12—Appeal forwarded through Election Officer—Right of appellant to be heard—Duty to communicate his desire to be heard.

What is contemplated by r. 12 of the rules for the preparation of Electoral Rolls is that the appeal to the appellate authority should be considered by him on the written material forwarded through the Election Officer by the appellant. It is for the person appealing to intimate his intention of appearing in person or through an agent and there is no provision in the rules for the appellate authority to give notice to anybody. Where there is ample time for the appellant to apply for being heard but he has failed to do so he cannot subsequently challenge the validity of the disposal of the appeal on the ground that he was not heard.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be placed to call for the records relating to the preparation of the preliminary and final Electoral Rolls of Muppala village in Nandigama Firka, and to issue a writ of *certiorari* quashing the order and proceedings of the Inspector of Local Boards and Municipal Councils, Madras, in respect of this matter.

V. T. Rangaswami Aiyangar for Petitioner.

The Government Pleader (K. S. Krishnaswami Aiyangar) for Respondents.

The Court delivered the following

Mockett, J.

JUDGMENTS. *Mockett, J.*—The facts in this case are not relevant to the point which we have to decide. The following only is relevant. The Election Officer of Kistna passed an order to which one Mr. Rama Yogi took objection. Mr. Rama Yogi filed an appeal in Form VI in accordance with r. 12 of the rules for the preparation of Electoral Rolls. That rule says:

"Any person feeling aggrieved by any order passed under sub-r. (*a*) of r. 11 by the Election Officer may prefer an appeal against such order to the election authority or to such person or persons as he may empower for hearing and disposing of such appeals".

---

* C. M. P. No. 4536 of 1936. 20th November, 1936.

Venkateswarulu
v.
The District Election Officer, Kistna.

Mockett, J.

The rule then goes on to prescribe that the appeal shall be in Form VI and shall be addressed to the appellate authority through an Election Officer and presented to the latter within five days of the passing of the order appealed against. Under sub-r. (2) the Election Officer shall forward every such appeal to the appellate authority together with a statement of the material facts of the case, the relevant papers and his own remarks on the grounds of appeal. The order of the appellate authority on such appeal shall be final and shall not be liable to be questioned in any legal proceeding.

It would seem on a reading of that rule that what is contemplated is that the appeal to the appellate authority shall be considered by him on the written material forwarded through the Election Officer by the appellant. But under r. 14 a right is given to the appellant to appear and be heard either in person or by an agent duly authorised in writing. It seems to me that it is for the person appealing to intimate his intention of appearing in person or through an agent because although there is provision under r. 13 for notice to be sent by the Election Officer to the persons concerned, under r. 11 (*a*) there is no provision for the appellate authority to give notice to anybody. There is nothing to prevent an appellant intimating his desire to be heard under r. 14 in his appeal notice in Form VI. I specially wish to guard myself against any suggestion that ample opportunity should not however be given to any person to appear by which I mean that if the appellate authority disposes of the matter in such time that it was impossible for the person aggrieved to intimate to him his intention of appearing, then I think that in such a case this Court might possibly think fit to interfere. But in this case what happened was this. The appeal was filed on the 1st October, 1936. It was disposed of on the 2nd November. Between the 1st October and the 2nd November, Mr. Rama Yogi appears to have done nothing. He did not intimate that he desired to be heard personally or by an agent; he does not appear even to have written to the appellate authority and so on the facts before him, that is, the documents forwarded by the Election Officer, the Inspector disposed of the appeal dismissing it. There is therefore before us no question of jurisdiction.

There appears to be no matter here contrary to the well-known rules governing writs of *certiorari* because it does not

Venkateswarulu v. The District Election Officer, Kistna.

Mockett, J.

appear on these facts that the appellate authority, the Inspector has acted in any way in conflict with the jurisdiction conferred upon him by the rules.

There is one other aspect of this case which may be referred to. Mr. Tampoe in an affidavit which has been placed before us states that full instructions were given to two persons whom he understood to be representing the objector regarding the rolls of the villages of Jagayyapet with which we are not now concerned and Muppala with which we are. According to Mr. Tampoe he told these two gentlemen that they must represent everything that was necessary before him in writing and in the case of one of them we are told that he was at one time an Advocate of this High Court. This is mentioned because it does appear that even on the merits in fact there has been any denial of a hearing to the petitioner. Speaking for myself I think he was abreast of everything, that was going on and he has only invoked these proceedings because he has failed.

I might add that in order to avoid a repetition of petitions of this sort it would be advisable for the Inspector to issue some sort of a notice and I would suggest perhaps the office of the Election Officer might be convenient spot giving some simple instructions to people proposing to file appeals or at least to put up a notice in his own office.

For the above reasons, this petition is dismissed with costs Rs. 100.

Lakshmana Rao, J.

Lakshmana Rao, J.—I agree.

B. V. V. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VARADACHARIAR.

The Secretary of State for India in Council represented by the Collector of Tinnevelly .. *Appellant** (*Defendant*)

v.

Rao Bahadur Paul Appaswami (dead) and others .. *Respondents* (*Plaintiff and nil*).

The Secretary of State for India in Council v. Paul Appaswami.

Water cess—Inam lands—No document of grant available—Evidences from conduct proving inamdar's right of ownership of tank and feeder

* S. A. Nos. 1753 and 1754 of 1931 and 659 of 1933.

11th November, 1936.

The Secretary of State for India in Council *v.* Paul Appaswami.

channel, the sources of irrigation for his lands—Proof sufficient—Immunity from water cess not restricted to mamool wet lands.

The Secretary of State appealed against decrees of the Courts below directing refund of water cess levied on plaintiff's inam lands and restraining him from levying water cess in future. There was no document of grant available, but from the existing evidences it could be easily inferred that the inamdar had been in enjoyment of the user of the tank and the feeder channel lying within the inam village. Moreover from the conduct of the inamdars, who had effected repairs to the tank, enjoyed the fishery lease thereof and otherwise treated themselves owners thereof, it was made out that there was no reservation of the source of irrigation to the grantor, the Government.

Held, (1) that when the inam register itself referred to the fact that the village was irrigated by water from the tank and that the tank received its water-supply from the feeder channel, it could not have been lost sight of that they formed part of the inam.

Secretary of State v. *Kannepalli Venkataratnammah,* (1912) 23 M.L.J. 109, applied.

(2) Once it was held that the tank was the property of tbe inamdar, the immunity of the inamdar from water cess would not be restricted to the extent of mamool wet lands.

Appeal against the Court of the Subordinate Judge of Tuticorin in A. S. No. 59 of 1930 preferred against the judgment of the Court of the District Munsiff of Tuticorin in O.S. No. 277 of 1929, and appeal against the decree of the Court of the Subordinate Judge of Tuticorin in A.S. No. 58 of 1930 preferred against the decree of the Court of the District Munsiff of Tuticorin in O. S. No. 365 of 1928.

The Government Pleader (*K. S. Krishnaswami Aiyangar*) for Appellant.

R. Krishnaswami, R. Srinivasan, S. V. Rama Aiyangar and *K. Venkateswaran* for Respondents.

The Court delivered the following

JUDGMENT.—These are second appeals by the Secretary of State for India against the decrees of the Courts below directing refund of water cess levied on the plaintiff's inam lands and restraining the defendant by injunction from levying water cess in future on those lands. All the three cases have heen dealt with together in the Lower Appellate Court and may similarly be dealt with here.

Though no document of grant is available, and indeed none seems to have been produced even before the inam commission there can be very little doubt that the inam grant was of the *entire* village and not of any portion thereof; reserving any other portion to the grantor. As pointed out by the Lower

The Secretary of State for India in Council *v.* Paul Appaswami.

Appellate Court, it is so stated in column 13 of the Inam Register and such other evidence as we have as to the user of the tank by the inamdar in respect of fishery rights and so on and of repairs executed by him to the tank only goes to confirm the inference suggested by the entries in the Inam Register that it must have been a grant of the whole of the village and not of a part of the village.

The Inam Register refers to the nature of the Original grant as one on *Kattukuthagai.* This is defined in Wilson's Glossary as land " held in farm on a permanently fixed money rent", but the account in Mr. Venkaswami Rao's Manual of the Tanjore District is fuller. It is there pointed out that the underlying idea was that the payment should be by way of a consolidated assessment on the entire village area, with full liberty to the grantee in respect of the extent of land to be brought under the plough and the crops to be raised, *without any enhancement of the demand.* The Inam Register also contains a note in this case that the village was originally granted on the *Kattukuthagai* system, " in consequence of the ruined condition of the tank at the time of the grant". This circumstance, far from making it probable that the tank was reserved by the grantor certainly supports the contrary inference that the grantee was expected to restore the tank and make it efficient as a source of irrigation. This again is in conformity with the subsequent course of conduct, *viz.*, that the inamdars have all along effected repairs to the tank, enjoyed the fishery lease thereof and otherwise treated themselves as owners of the tank. It is thus clear that even the considerations mentioned in *Ambalavana Pandara Sannathi* v. *Secretary of State for India*[1] and *Narayanaswamy Naidu* v. *Secretary of State for India*[2], in favour of an inference of reservation of the source of irrigation to the grantor do not exist here. On the other hand, the case will be governed by the principle recognised by Benson and Sundara Ayyar, JJ., in *Secretary of State* v. *Kannepalli Venkataratnammah*[3].

The learned Government Pleader put forward an argument with reference to the extents entered under the various heads in the Inam Register, that they do not comprise the bed of the tank as part of the Inamdar's land. I do not agree that a correct reading of those entries supports that argument. As

1. (1905) 15 M.L.J. 251: I.L.R. 28 Mad. 539. 2. (1912) 24 M.L.J. 36.
3. (1912) 23 M.L.J. 109.

The Secretary of State for India in Council *v.* Paul Appaswami.

usual the whole extent of the village is first stated, a certain portion is deducted as *poramboke* and the rest alone classified under the three heads of wet, dry and garden, each head being sub-divided in turn under cultivated and *poramboke*. I presume that the tank bed and the bed of the channel must be comprised in the first general deduction under the head of *poramboke*. The Inam Register itself refers to the fact that the village is irrigated by water from this tank and that this tank receives its supply of water from the Chittar river through a feeder channel. It certainly could not therefore have been lost sight of that the tank formed part of the Inam. I therefore see no reason to differ from the conclusion of the Courts below that the tank which is wholly situated within the inam village and so much of the feeder channel as lies within the limits of the Inam village form part of the Inamdar's property.

It is true that the decision of the Privy Council in *The Secretary of State for India* v. *Srinivasa Chariar*[1] has put a restricted interpretation upon the nature of the Inamdar's property in the land granted to him as inam, but no difficulty arises in the present case on account of that theory because even in the view that the land was granted to him only for the purpose of cultivation, it must reasonably follow that the tank also must have passed to him to the extent necessary to enable him to cultivate the lands thus granted. We are not concerned in this case with any question of sub-soil rights.

Once it is held that the tank is the property of the Inamdar, at least in the sense above indicated, and it not being proved that the size of the feeder channel or the tank has been enlarged by the Inamdar, I see no reason for not following the course of decisions in this Court which have held that the Inamdar's immunity from water cess is not restricted to the extent of *mamool* wet lands.

The Second Appeals fail and are dismissed. As regards costs the respondent in S. A. No. 1753 of 1931 will get the costs incurred in respect of printing charges and vakalat. Counsel's fee will be allowed in S. A. No. 659 of 1933—only one set—to be shared equally by respondents 1 and 2. Time for payment three months.

Leave to appeal refused.

K.C. —— *Appeals dismissed.*

1. (1920) 40 M.L.J. 262: L.R. 48 I.A. 56: I.L.R. 44 Mad. 421 (P.C.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR HORACE OWEN COMPTON BEASLEY, *Kt.*, *Chief Justice.*

Seshan Pattar's son Ramanadha Aiyar .. *Petitioner** (*Plaintiff*)

v.

G. G. Narayanaswamy Aiyar .. *Respondent* (*Defendant*).

Ramanadha Aiyar *v.* Narayanaswamy Aiyar.

Stamp Act (*II of 1899*), *S. 35—Promissory note—Insufficiently stamped—Whether could be used as an acknowledgment of original debt—Chit fund —Nature of transaction and liability.*

Where a promissory note mentioned an amount due on 30th November, 1929, and the suit on it was filed on 10th March, 1934, and as the note was insufficiently stamped the suit was not brought upon it, though the note was put at the trial as an acknowledgment of debt to remove the bar of limitation which otherwise was in the way of the claim,

Held, that the promissory note which was insufficiently stamped could not be used for the purpose of proving an acknowledgment by the maker of it of his indebtedness. Hence the suit was barred by limitation.

Judgment in S. A. No. 124 of 1930, followed.

Rakkappan v. *Suppiah*, A.I.R. 1930 Mad. 485 and *Vancheswara* v. *Narayana*, A.I.R. 1933 Mad. 251, dissented from.

Semble: It is very difficult to see a chit fund transaction can possibly be a contract whereby the subscriber is to lend a certain sum of money to the stake-holder. It is more in the nature of a contract on the part of the subscriber to pay a certain sum of money to the stake-holder under the rules of the chit fund and when he has broken his contract there is nothing at all to prevent the stake-holder from suing him for the money which he has contracted to pay.

Raghavan Pattar v. *Arumugham*, (1934) 68 M.L.J. 283, referred to.

Petition under S. 25 of Act IX of 1887 praying the High Court to revise the decree of the Court of the Subordinate Judge of Palghat dated the 9th day of August, 1934 and made in Small Cause Suit No. 107 of 1934.

P. V. Venugopala Aiyar for Petitioner.

K. Rajah Aiyar and *N. R. Sesha Aiyar* for Respondent.

The Court delivered the following

JUDGMENT.—In my view, this Civil Revision Petition must be dismissed with costs although that result is reached by coming to a different decision upon the point of limitation to that reached by the learned Subordinate Judge. It seems to have been conceded in the lower Court that the promissory note Ex. B was insufficiently stamped and the suit was not brought upon the promissory note at all. The only use to which it was put at the trial was as an acknowledgment of his debt to

* C. R. P. No. 380 of 1935. 16th November, 1936.

Ramanadha Aiyar *v.* Narayanaswamy Aiyar.

remove the bar of limitation which otherwise was obviously in the way of the claim, the amount sued for having been due on the 30th November, 1929, and the suit filed on the 10th March, 1934. The learned trial Judge held that although the note could not be used as a promissory note it could nevertheless be used as an acknowledgment of the defendant's liability for the debt sued upon and he relied upon the decisions in *Vancheswara* v. *Narayana*[1] and *Rakkappan* v. *Suppiah*[2]. The learned Subordinate Judge had not got before him the unreported decision of a Bench of this Court to which I myself was a party in *K. M. Subbayyar and Sons* v. *P. N. Lakshmana Aiyar and others*[3] in which judgment was given on 6th September, 1934. There the Bench took a view contrary to that expressed in the two decisions of Krishnan Pandalai, J., sitting alone to which I have just made reference. It was held that a promissory note which was insufficiently stamped could not be used for the purpose of proving an acknowledgment by the maker of it of his indebtedness. That decision is not only binding upon me but I think is a correct one as well. The learned Subordinate Judge has quite rightly taken this to be a document which comes within S. 35 of the Stamp Act. It is true that it is a promise to pay at a future date instead of on demand but it is nevertheless a promise to pay and is in my opinion clearly provided for by S. 35 of the Stamp Act. Therefore the learned Subordinate Judge should have held that the suit was barred by limitation as an insufficiently stamped note could not be used in evidence for any purpose and it is not necessary for me to deal with the other questions raised before him. But I think it necessary to say this that the suit was brought by the assignee from the receiver appointed in a partition suit in the stake-holder's family which at the time of the starting of the kuri or chit was an undivided family. This was an auction chit and there were to be 14 auctions. There were 15 subscribers each of them subscribing Rs. 500 for 15 instalments. Except with regard to the 2nd instalment out of which the suit arose, the same procedure was adopted with regard to the others. The 15 subscribers subscribed each Rs. 500 making a total of Rs. 7,500. This sum of money was immediately put up in auction and sold to

---

1. A.I.R. 1933 Mad. 251.
2. A.I.R. 1930 Mad. 485.
3. S. A. No. 124 of 1930.

Ramanadha Aiyar v. Narayanaswamy Aiyar.

the subscriber or bidder who was prepared to give the largest discount. He then got the sum of money less the discount offered by himself. This discount at the 1st auction was divided up amongst all the subscribers except the successful bidder. The 2nd instalment differed considerably from all the others in that the whole of the subscriptions of the 15 subscribers amounting to Rs. 7,500 went to the stake-holder. It was in fact his prize and thereafter at all the other auctions the discount offered by the successful bidder was divided up amongst those subscribers who had not been successful at the previous auctions and excluding the stake-holder. The defendant paid his subscription in respect of the first instalment and also the third and the fourth when my information, which I got from Mr. K. Rajah Aiyar, is that the chit stopped. The whole of the trouble arises in this case in respect of the second instalment. The defendant did not subscribe his Rs. 500 as he ought to have done. Instead a promissory note payable in three years' time was taken from him and, as he did not pay the amount, the suit was filed against him as I have already stated not on the promissory note because it was not sufficiently stamped but upon the original debt, *viz.*, Rs. 500. The learned trial Judge having found in favour of the plaintiff on the point of limitation then proceeded to deal with the claim upon the original debt. He dismissed the suit because he held that it was really a suit claiming specific performance of a contract to lend. This means that he regarded the stake-holder as the borrower and the subscriber as the lender and the suit against the latter as being one to enforce a contract entered into by him to lend Rs. 500 to the stake-holder on the date of the second instalment. It is very difficult to see how this can possibly be a contract whereby the subscriber is to lend a certain sum of money to the stake-holder. It has been held, in a case of a similar auction chit where it was contended that the chit subscriber was a borrower from the fund, that he was not a borrower but he was merely the purchaser of a sum of money. (Vide *Raghavan Pattar* v. *Arumugham*[1].) In the present case the lower Court reverses the position unsuccessfully put forward in that case and treats the subscriber as the lender and the stake-holder as the borrower. I do not agree as I quite fail to see how it can possibly be said that this is in any sense a contract entered

1. (1934) 68 M.L.J. 283.

Ramanadha Aiyar v. Narayanaswamy Aiyar.

into by a subscriber to lend money to the stake-holder. It seems to me to be more in the nature of a contract on the part of the subscriber to pay a certain sum of money to the stake-holder under the rules of the chit fund and when he has broken his contract there is nothing at all to prevent the stake-holder from suing him for the money which he has contracted to pay. However, I have not heard any argument from Mr. Rajah Aiyar on behalf of the respondent on this point and I therefore do not decide it. I merely express the opinion I have come to without hearing any such argument. The result is that the suit must fail on the question of limitation and this Civil Revision Petition dismissed with costs.

K. C. ——— *Petition dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Allahabad.]

PRESENT:—LORD ALNESS, SIR SHADI LAL AND SIR GEORGE RANKIN.

The Kayastha Pathshala, Allahabad .. *Appellants**

v.

Musammat Bhagwati Devi and others .. *Respondents.*

P.C.

Kayastha Pathshala, Allahabad v. Mt. Bhagwati Devi.

Trust—Deed of settlement—Direction for appropriation of property—Objects partly educational and charitable, and partly benevolent—Validity—Transfer of Property Act (IV of 1882), Ss. 14, 16, 17 and 18—Applicability—Administration of trust by settlor and by trustee after his death—Suit by settlor's heir for avoidance of trust deed and for possession—Invalidity of part of gifts—Whether good ground for ejectment of trustee.

The testator, who was an orthodox Hindu and had no male issue, executed a will in 1898 whereby he vested in the Kayastha Pathshala the substantial portion of his property subject to a series of trusts. His only daughter having been married in 1900 he executed a codicil to his will in 1903 making provision for certain relations but not otherwise fundamentally altering the scheme of the will. In April, 1914, he executed a deed of trust wherein after referring to his Hindu beliefs, his desire to maintain the temples built by himself and his ancestors, his desire for improved education among Kayasthas, and his desire to provide for his heirs, relations and family servants, he declared that his properties should be considered to be included in the trust for the following objects: Worship in the residential house, repairs and expenses of certain temples and fair, expenses of funeral of the testator and his wife, payment of donation to the Kayastha Pathshala for establishing a college for higher education, and other donations for educational purposes. The deed also provided gifts in the nature of private benevolence towards relations and friends and also for payment of the settlor's debts. The settlor acted as trustee up to his death in 1924 and after him the Kayastha Pathshala succeeded to the trusteeship. In May, 1928,

*P. C. Appeals Nos. 103 and 104 of 1933. 20th November, 1936.
Allahabad Appeals Nos. 33 and 37 of 1931.

P.C.

Kayastha Pathshala, Allahabad v. Mt. Bhagwati Devi.

however the settlor's daughter as heiress and her two sons as presumptive reversioners to the estate of the settlor instituted the present suit for a declaration that the deed of trust was wholly void, for delivery of possession of the properties to the settlor's daughter, and for mesne profits. The Kayastha Pathshala and the other persons entitled to beneficial interests under the trust deed were impleaded as defendants.

Held, that the deed of trust was not a mere ' paper transaction ' inasmuch as it had been acted upon by the settlor himself for several years, that it was not an unlawful agreement under Ss. 23 and 24 of the Contract Act and that it was in the nature of a private bounty and educational trust.

Held, further, that though serious questions might arise under Ss. 14, 16, 17 and 18 of the Transfer of Property Act in connection with several of the dispositions in favour of the relations and friends of the settlor, the invalidity of such gifts would not be fatal to the other dispositions which were valid and apparently separable, and that consequently the Kayastha Pathshala could not be ejected from the trust properties at the instance of the plaintiffs. It would be open to any person interested, including any of the plaintiffs, in appropriate proceedings to have the deed construed and its provisions so far as valid applied to the events which have happened and all further questions settled whether arising under the deed, the will or on intestacy.

Decision of the High Court of Allahabad reversed.

These are consolidated appeals from a decree of the High Court of Judicature at Allahabad dated 6/27th July, 1931, reversing a decree of the Additional Subordinate Judge at Benares dated 15th October, 1929, and decreeing the plaintiff No. 1's suit for possession and mesne profits.

The facts are set out at full length in the judgment of their Lordships.

Gavin T. Simonds, K.C. and *W. Wallach* for Appellants.—The deed of trust created a valid and binding trust and did not offend against any provision of law and is not open to the objections enumerated in paragraph 5 of the plaint. The object of the trust was not to tie up the property indefinitely for purposes not allowed by law. The trust property legally vested in the Kayastha Pathshala and the settlor's daughter is not entitled to any of the reliefs claimed by her. If any part of the trust is for a void purpose it can be separated from the trust in so far as its purposes are valid, to which extent it can be carried out. In any event no decree ought to have been passed for accounts or mesne profits in favour of the settlor's daughter, plaintiff No. 1. The High Court is wrong in saying that where you have a trust deed which is valid as to 40 per cent. and invalid as to 60 per cent. the whole trust must fail. The deed is not void *ab initio*. The Indian Succession Act cannot apply. Refers to *Pertab Narain Singh* v. *Subhao Kooer*[1] and *Ram Charan Ramanuj Das* v. *Gobinda Ramanuj Das*[2].

1. (1877) L.R. 4 I.A. 228 at 245. 2. (1928) L.R. 56 I.A. 104 at 110.

P.C.

Kayastha Pathshala, Allahabad *v.* Mt. Bhagwati Devi.

DeGruyther, K.C., Norman Daynes, K.C. and *Dr. K. N. Katju* for Respondents.—The trust is invalid in its entirety. Relies on *Mujibunnissa* v. *Abdul Rahim*[1] and *Balla Mal* v. *Ata Ullah Khan*[2]. It was held in *Sookhmoy Chunder Dass* v. *Srimati Monohurri Dasi*[3], that an attempt to create perpetuity is bad and fails in Hindu Law. Therefore the entire trust fails. The property must be substantially dedicated to charity, not that the gifts to charity must be substantial. Refers to *Balla Mal* v. *Ata Ullah Khan*[2]. It was the duty of the Court to make the order in the terms in which it was made. Civil Procedure Code, O. 41, r. 33.

Norman Daynes, K.C., followed.—The trust deed does not display a general charitable intention. The objects of the trust are (1) of a domestic character, (2) in the nature of administration, (3) provision for the payment of debts, (4) accumulation of profits, and (5) some objects of a charitable character. The charitable gifts are of such a residuary character that coming as they do after the objects involving an expense which cannot be ascertained, they must fail. Where the trusts are incapable of being carried into effect the whole of the trust fails. Refers to *Peek* v. *Peek*[4], In re *Porter*,[5] per Eve, J. As to " deserving objects ", see In re *Sutton*[6].

Gavin T. Simonds, K.C., replied.

20th November, 1936. Their Lordships' judgment was delivered by

Sir George Rankin.

SIR GEORGE RANKIN.—The question in the present case is whether a deed of trust executed by one Mahadeo Prasad as settlor on the 9th April, 1914, is or is not wholly invalid for the reasons alleged in paragraph 5 of the plaint as follows:—

" 5. That the alleged deed of trust is wholly null and void, and did not in fact or in law create any valid trust and is not binding on the natural heirs of the said Chaudhri Mahadeo Prasad for the following, among other, reasons:—

" (*a*) The said deed was a mere paper transaction. It was never enforced nor acted upon during the lifetime of the said Chaudhri Mahadeo Prasad who continued to be the owner of the properties and to enjoy the profits thereof as owner as heretofore.

" (*b*) The alleged trust was not really created for any lawful purpose. The real purpose for creating the alleged trust was to prevent the devolution of the property on the death of the said Chaudhri Mahadeo Prasad according to law. The real purpose was to preserve and keep the property intact and undivided and to increase it in bulk and value *ad infinitum* and to accu-

1. (1900) L.R. 28 I.A. 15.
2. (1927) L.R. 54 I.A. 372 at 380.
3. (1885) L.R. 12 I.A. 103.
4. (1869) 17 W.R. 1059.
5. (1925) 1 Ch. 746 at 751.
6. (1885) 28 Ch.D. 464.

mulate a part of its profits indefinitely; to regulate the succession thereto by the descendants of Chaudhri Mahadeo Prasad and his other relations and their children, generation after generation, in the male line, under an ostensible scheme of regulating their enjoyment of a substantial part of the income and profits of the property through the intervention of an illegal trust in a manner totally unknown and repugnant to Hindu Law. All the said purposes are wholly unlawful.

" (*c*) The alleged trust in so far as it purported ostensibly to be a trust for charitable purposes was void inasmuch as it was not irrevocable.

" (*d*) The various provisions for ostensible charitable purposes were a mere devise to lend a colour of reality and validity to the document. The said charitable dispositions were illusory and dependant upon remote contingencies and were not likely to come into operation at all. In any case the lawful purpose (if any) was inextricably mixed with the dominant and unlawful purpose and inasmuch as the lawful and the unlawful purposes cannot be separated from each other the whole trust is void.

" (*e*) The alleged trust is further void for remoteness and vagueness and is opposed to public policy and is contrary to fundamental principles of Hindu Law."

The suit was brought on the 25th May, 1928, by the settlor's daughter and her two sons in their respective characters of heiress and presumptive reversioners to the estate of the settlor under the Hindu Law. They impleaded the present appellants the Kayastha Pathshala Allahabad and a number of persons who appear upon the terms of the deed to be entitled to beneficial interests of one kind or another. The settlor was by caste a Kayastha and the Kayastha Pathshala Allahabad is a society registered under the Societies Registration Act (XXI of 1860) with objects which include the management of a school of that name, the maintenance of a library and assistance to students of the Kayastha community. Upon the settlor's death (5th December, 1924), this society, in accordance with the terms of the deed, succeeded him as trustee and in due course and without objection obtained mutation to the immovable properties comprised in the deed. It is plain enough that until shortly before the present suit the society's possession of the trust property as trustee and its assumption and discharge of the duties of trustee was with the consent of the settlor's daughter her husband and major son.

The relief claimed by the plaint is (1) a declaration that the deed of trust is wholly void, (2) that the settlor's daughter (plaintiff No. 1) be awarded possession of the properties comprised therein, (3) mesne profits, and (4) costs.

The case made is not that the plaintiffs desire the administration of the trust property in accordance with the deed, or

P.C.

Kayastha Pathshala, Allahabad v. Mt. Bhagwati Devi.

Sir George Rankin.

that, the trusts of the deed having been fully carried into execution as regards some or all of the properties, the plaintiffs are entitled to benefit under a resulting trust, or are otherwise entitled to have possession of such properties. The plaintiffs' case is that the deed of trust was altogether void *ab initio* and that the possession of the Kayastha Pathshala has been wrongful throughout.

The learned trial Judge (Additional Subordinate Judge of Benares) on the 15th October, 1929, dismissed the suit with costs, but a Division Bench of the High Court at Allahabad on the 27th July, 1931, set aside his decree and gave to the first plaintiff (Mahadeo Prasad's daughter Musammat Bhagwati Debi) a decree in ejectment with a direction that the Kayastha Pathshala should account for the profits of the property in a manner and upon principles which need not here be detailed.

Mahadeo Prasad, an orthodox Hindu, had no male issue. His properties were extensive. On the 17th November, 1898, he made a will whereby, in the event of his leaving no male issue, he vested in the Kayastha Pathshala the whole of his property (with certain exceptions) subject to a series of trusts bearing considerable resemblance to trusts afterwards declared by the trust deed now before the Board. His only daughter having been married in 1900, he executed a codicil to his will on 4th November, 1903, making provision for certain relations but not otherwise fundamentally altering the scheme of the will. The deed of trust executed by him on 9th April, 1914, began by referring to his Hindu beliefs, his desire to maintain the temples built by himself and his ancestors, his desire for improved education among Kayasthas, his intention to provide for his heirs, relations and old family servants, and his wish that two houses belonging to him—one in Allahabad and one in Nanpur—should be preserved:—

"For all these objects I made directions under a will and a codicil. But as I have been suffering from albuminuria for the last 14 years, and my right eye has become defective since 1909, it is now my intention that I should after making arrangements for myself also, create a trust about all these matters during my lifetime, so that I might be somewhat relieved during my lifetime, be able to spend most of my time in the worship of God and be also satisfied that proper arrangements about all the matters would be made. Therefore, I, while in a sound state of body and mind and in the enjoyment of all my senses, proclaim and declare a trust in respect of my entire immovable property worth about 17 lacs of rupees, mentioned in list (*a*) at the foot

P.C.

Kayastha Pathshala, Allahabad *v.* Mt. Bhagwati Devi.

Sir George Rankin.

of this document, with the exception of house No. 764, situate in mohalla Yahaiapur, known as Kothi Satti Chaura, and mauza Kayam Khadau, Tauzi No. 6926 included in No. 4 pargana 63, district Darbhanga, and give in writing that the entire immovable property, aforesaid, which is at this time in my possession, shall be considered to be included in the trust for the *undermentioned objects*, on the conditions specified below, which trust shall inure for ever."

Cl. 2 of the deed details the objects of the trust by short descriptions lettered (*a*) to (*s*) of which the first nine are as follows:—

"(*a*) Worship in the residential house in the city of Allahabad.

"(*b*) Repairs and expenses of the temple of Sheo at Nanpur.

"(*c*) Repairs and expenses of the temple of Sheo at Benares.

"(*d*) Repairs and expenses of the temple of Sheo at Qasba Kara, in the district of Allahabad.

"(*e*) Expenses of the fair of Sri Kalyani Debi, held in the city of Allahabad.

"(*f*) The funeral, 'shrad' and Gaya expenses of mine (sic) and those of my wife.

"(*g*) Payment of the donation to the Allahabad Kayastha Pathshala or (expenses of) establishing a college in the name of me, the executant, for higher education.

"(*h*) Payment of donation to the Hindu University.

"(*i*) Scholarship and aid to indigent students of my caste."

The remaining objects are ordinary forms of private benevolence towards relations and friends—*e.g.*, allowances, houses, dowries; to which are added payment of the settlor's debts and improvement of the value of the trust property.

Elaborate provisions are laid down for the management of the trust, 15 per cent. of the entire income being reserved for management expenses. In the Allahabad house a right of residence is given to his widow, daughter, eldest grandson and his male descendants according to the rule of primogeniture (cl. 9). The income of the village Gaura is appropriated to the expenses of the temple at Benares (cl. 12). Three-fourths of the net profits of certain shares in villages in the district of Allahabad is given to two named relatives in equal shares with a provision that the right is to go to their male descendants generation after generation, and on failure of male descendants to certain females. Three-fourths of the profits of other villages is given to the settlor's nephews and is to go to their male descendants and in default to certain females (cl. 15).

The remainder of the profits of the trust property, after providing certain annual sums for pujas and repairs and Rs. 20,000 for the funeral and shradh of the settlor and his

P.C.

Kayastha Pathshala, Allahabad *v.* Mt. Bhagwati Devi.

Sir George Rankin.

wife, is to be divided into two equal parts. The first half of such profits is to provide a perpetual allowance going first to the wife, then to the daughter, then to the grandsons, then to the male issue of the grandsons generation after generation according to a complicated scheme. The second half of such profits, after carrying one-twentieth thereof to reserve, is to be applied to the upkeep of the Nanpur house, certain travelling expenses, the payment of two sums of Rs. 10,000 to nephews, establishing new markets in connection with the trust properties, support and assistance to members of the settlor's family and near relations, support and education of certain named persons, the marriage expenses of the three daughters of a friend, and the payment of a lac of rupees to the Kayastha Pathshala Allahabad. When a lac of rupees has been accumulated to ensure payment of land revenue and as a provision in case of famine and other emergency, then two other objects are brought within the trusts which apply to "the second half of the profits"—*viz.* (1) the giving of Rs. 25,000 to the Hindu University at Benares upon certain conditions and (2) scholarships and help for indigent Kayastha students.

Upon the face of this summary description of the trusts of the deed it is evident that serious questions may arise under Ss. 14, 16 and 17 of the Transfer of Property Act in connection with several of the dispositions in favour of relatives and friends. The consequences which would flow from this or that disposition being held to be invalid call for careful consideration, both as a matter of construction of the deed, and also in view of the question whether the will of the settlor was revoked by the deed, in whole or in part, absolutely or conditionally. If the present suit had been a suit for administration of the trusts of the deed and of the assets belonging to Mahadeo at the date of his death, detailed consideration of the problems presented by this settlement in the events that have happened might before now have elucidated the rights of the plaintiffs, whether as Mahadeo's representatives or otherwise. But their Lordships find it difficult to understand why the invalidity of certain of the gifts to relatives should be supposed to be fatal to other dispositions apparently separable, or why the charitable gifts should be thought bad because, though substantial, they do not involve a sufficiently large part of the settled property, or because the beneficial interest is not given to a specified individual or individuals. Nor does it now

P.C.

Kayastha Pathshala, Allahabad v. Mt. Bhagwati Devi.

Sir George Rankin.

matter that the settlor reserved to himself a power, which he never exercised, to revoke the trusts. There is in this case no question of any attempt to defraud creditors, and, as the settlor himself acted for years as trustee in carrying out the terms of the deed, the contention that the deed was a mere "paper transaction" cannot be maintained. In so far as the settlor's bounty to his relatives has been misguided and is contrary to law it will fail of effect, and other dispositions will also fail if they are dependent thereon or inseparable therefrom. But the deed is not an unlawful agreement under Ss. 23 and 24 of the Contract Act, nor does anyone suppose that the deed was intended to create a debutter,—still less that this Hindu was establishing a Mahommedan wakf. No doubt the authorities are clear to the effect that a disposition of property cannot be supported as a dedication if it is not a real dedication. Thus in the case of a wakf, before the Mussulman Wakf Validating Act (VI of 1913) it was held that the test was not whether the gift to charity was substantial but whether the property was substantially dedicated to charity (*Balla Mal* v. *Ata Ullah Khan*[1]). The principle to be applied to the case of a Hindu debutter may be seen from *Jadu Nath Singh* v. *Thakur Sita Ramji*[2]. But, though the settlor had certain religious objects, the case before the Board is in its general character a case of private bounty and educational trusts. The question which arises is not the question of dedication, but of the application to these particular trusts of Ss. 14, 16, 17 and 18 of the Transfer of Property Act, or more strictly, as the deed was executed before 1929, of these sections read subject to the saving (at that time made by S. 2 of the Act) for the rules of Hindu Law. Under these sections non-charitable dispositions bad for perpetuity will not be validated by the presence of charitable trusts.

As the case of *Sookhmoy Chunder Dass* v. *Monohurri Dasi*[3] has been referred to by the High Court and cited to the Board in argument by learned counsel for the respondents, it may be noted that the Hindu rule against perpetuity was in that case applied to the provisions of a Hindu's will with the result that no independent gift for charitable or religious purposes remained. Six-sixteenths of the income

1. (1927) L.R. 54 I.A. 372 at 380. 2. (1917) L.R. 44 I.A. 187.
3. (1885) L.R. 12 I.A. 103.

P.C.

Kayastha Pathshala, Allahabad *v.* Mt. Bhagwati Devi.

Sir George Rankin.

was to be devoted to maintaining the family worship and the family for ever: this provision was held bad, no part of the corpus of the estate ever vesting in anyone beneficially.

To treat the deed of 9th April, 1914, as a nullity because of the "dominant" or "substantial" purpose of the deed as a whole is not in their Lordships' opinion a conclusion warranted in this case by any principle of law. It will be open to any person interested, including any of the plaintiffs, in appropriate proceedings to have the deed construed and its provisions so far as valid applied to the events which have happened, and all further questions settled whether arising under the deed, the will or on intestacy. But that the Kayastha Pathshala should be ejected from the trust properties in the suit now before the Board is in their Lordships' opinion without legal warrant, and their Lordships will humbly advise His Majesty that this appeal should be allowed and the decree of the trial Court dismissing the suit should be restored with costs throughout. The cross-appeal must be dismissed with costs.

Solicitors for Appellants: *Hy. S. L. Polak & Co.*

Solicitors for Respondents: *R. S. Nehra & Co.*

R. C. C. *Appeal allowed.*

B. V. V. *Cross-appeal dismissed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VARADACHARIAR, MR. JUSTICE BURN AND MR. JUSTICE PANDRANG ROW.

The Secretary to the Board of Revenue (Separate Revenue), Madras .. *Petitioner**

v.

Rm. Pl. N. Rm. Alagappa Chettiar and another .. *Respondents.*

F.B.

The Secretary to the Board of Revenue *v.* Alagappa Chettiar.

Stamp Act (II of 1899)—Partnership with five partners—Dissolution of—Deed allotting the net assets in two groups between them—If an "instrument of partition"—'Severalty' in S. 2, cl. (15)—Meaning of—If division must be between individuals—*Instrument also a deed of dissolution—Effect of—Chargeable as partition deed by reason of S. 6—Partners—If co-owners.*

Where two firms at *N* and *K* were jointly owned by five persons, of whom three were undivided members of a family, the fourth their distant and separated coparcener and the fifth a stranger, and an award was passed

* Referred Case No. 5 of 1935. 17th November, 1936.

by arbitrators and embodied in a document assigning the firm at *N* to the three undivided members as a group and the firm at *K* to the other two persons as a group.

Held, the document is "an instrument of partition" within the meaning of S. 2 (15) of the Stamp Act and must be stamped as such under Art. 45. Though it may also fall under Art. 46 (*b*) as an instrument of dissolution of partnership, it has to be stamped under Art. 45 with the higher stamp duty by reason of S. 6.

The fact that the allotments are not to each individual among the original co-owners but to groups does not make any difference because the true antithesis in S. 2 (15) is between the original common ownership and the subsequent cessation of *that* common ownership. From the difficulty in applying the conception of co-ownership to individual items of partnership assets, it is not correct to say that partners are not co-owners with regard to the net assets of the partnership on the dissolution and a document embodying an arrangement dividing the assets between themselves, though it may take place as part of a scheme of dissolution as well, is "an instrument of partition".

Choturam v. *Ganesh*, (1901) 3 Bom.L.R. 132, approved.

Case stated under S. 57 of the Stamp Act II of 1899 by the Board of Revenue (Separate Revenue), Madras.

The Government Pleader for Petitioner on 16th November 1936.

N. Srinivasa Aiyangar for *The Government Pleader* this day.

K. Rajah Aiyar, V. Ramaswami Aiyar and *N. G. Krishna Aiyangar* for 1st Respondent.

Other respondent appeared neither by person nor by Advocate.

The judgment of the Court was delivered by

Varadachariar, J.

Varadachariar, J.—The nature of the document with reference to which this reference under S. 57 of the Stamp Act has been made is briefly described as follows in paragraph 2 of the Board's reference. It is "an award by arbitrators and purports to direct a partition of two firms (A. L. Rm. of Nattanjan and A. L. Rm. of Kayan in Burma) between the five parties to the deed named therein. Of these five parties, Nos. 1 to 3 are undivided members of a family, No. 4 is their distant and separated coparcener and No. 5 is a stranger. The arbitrators after examining the parties orally and looking into the accounts have assigned by casting lots the A. L. Rm. firm at Nattanjan with all its assets and liabilities to the first group of parties Nos. 1 to 3 and the other firm at Kayan to the parties Nos. 4 and 5". The document was executed in Burma on a stamp paper of Rs. 5 as a deed of dissolution of partner-

F.B.

The Secretary to the Board of Revenue *v.* Alagappa Chettiar.

Varadachariar, J.

ship. The Collector of Ramnad was of opinion that the document should be stamped as an instrument of partition.

The Board's reference indicates the difficulty which the Board felt in agreeing with the Collector's view. In S. 2, cl. (15) of the Stamp Act, an instrument of partition is defined as "any instrument whereby co-owners of any property divide or agree to divide such property in severalty", and it includes also "an award by an arbitrator directing a partition". Having regard to the meaning of the word "severalty" as given in the Concise Oxford Dictionary the Board thought that the division could be said to be one in 'severalty' only if the allotments had been to each *individual* sharer and not when the allotments were made as between several sub-groups of sharers all of whom together originally owned the properties in common. We do not think there is any force in this distinction. The true antithesis is between the original common ownership and the subsequent cessation of *that* common ownership. Whether the substituted ownership is created by way of allotments to each individual amongst the original common owners or to groups of individuals is not really the point for consideration but whether the original common ownership has ceased to exist or not.

Before us, however, the objection has been stated in a different form by Mr. K. Rajah Aiyar who appears for the party. He contended that there being a special article, namely, Art. No. 46 providing for an instrument of dissolution of partnership there is no reason why the document in the present case should be held to fall by a strained construction under the definition of an instrument of partition. This argument ignores the provision in S. 6 of the Stamp Act which enacts that wherever an instrument is so framed as to come within two or more of the descriptions in Sch. I and the duties chargeable thereunder are different, that document will be chargeable only with the higher of such duties. It is therefore no argument to say that the instrument in question is one relating to the dissolution of a partnership if according to its terms it also falls under the definition of an instrument of partition. The decisions in *Christie* v. *Commissioners of Inland Revenue* and *Phillips* v. *Commissioners of Inland Revenue*[1]

1. (1866 and 1867) L.R. 2 Ex. Cases 46 and 399.

F.B.

The Secretary to the Board of Revenue v. Alagappa Chettiar.

Varada-chariar, J.

indicate that even according to the English practice where a dissolution of partnership is carried out by a document which in form effects an assignment of a partner's share to another partner, the document is charged to stamp duty as a 'conveyance'. This shows that the fact of its being part of a scheme for the dissolution of a partnership does not prevent its being chargeable to stamp duty under other heads as well, if the terms of the document fall under some other head.

Mr. Rajah Ayyar next contended that the document is not an instrument of "partition" because it would not be proper to regard partners as *co-owners* of the partnership property. The alternative views on this question have been stated in *Venkataratnam* v. *Subba Rao*[1] and *Samuvier* v. *Ramasubbier*[2], respectively. As pointed out in the latter case, there was a specific provision in S. 253 of the Contract Act declaring the partners to be the "joint owners" of the partnership property in the absence of any contract to the contrary. It will not therefore be correct to say that partners cannot be regarded as joint owners of the partnership property. It is true that the wording of S. 14 of the Partnership Act of 1932 is slightly different but it does not appear to us that it was intended to indicate any difference in principle (*See* Lindley on Partnership, Book III, Ch. V, S. 1). Mr. Rajah Ayyar instanced the possibility of a person being a working partner without any share in the partnership property but this involves no inconsistency with the above conception because the conception of co-ownership will be only in proportion to their shares in the partnership and is always qualified by 'contracts to the contrary' if any. The difficulty in applying the conception of co-ownership to individual items of partnership assets, is no reason against applying that description to the net assets of the partnership on the dissolution. S. 265 of the Contract Act was worded in a form suggesting that it was for the Court to distribute the net assets as amongst the partners; but S. 46 of the Partnership Act of 1932 puts it clearly as a right of the partners to claim to have the surplus distributed amongst them or their representatives according to their rights. There is in our opinion accordingly no inherent incompatibility between the conception of co-ownership and the position of partners. On what basis the

1. (1926) 51 M.L.J. 410: I.L.R. 49 Mad. 738.
2. (1931) 60 M.L.J. 527.

F.B.
The Secretary to the Board of Revenue *v.* Alagappa Chettiar.
Varadachariar, J.

valuation is to be made for the purpose of assessing stamp duty is a matter on which we are not called upon to express any opinion.

Our attention was drawn to a case in *Annamalai Chetty* v. *Annamalai Chetty*[1], where a Bench of this Court laid down that no partner has a right to claim a division of any specific item of partnership property. This case does not touch the question whether, taking the partnership assets as a whole, the partners are co-owners or not. On the other hand, in *Choturam* v. *Ganesh*[2], where an arrangement had been made between partners dividing certain items of partnership assets between themselves without dissolving the partnership, a Bench of three Judges held that the document amounted to an instrument of partition. We do not see any reason for applying a different principle merely because such an allotment takes place as part of a scheme of dissolution.

Our answer to the reference is that the document is liable to be charged to stamp duty as an instrument of partition.

S. V. V. —— *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW.

Pattinathan *alias* Krishnaswami Naidu .. *Petitioner**

Pattinathan, *In re.*

Sea Customs Act (VIII of 1878), Ss. 167 and 186—Obstruction to Customs Officer—What constitutes—Person going on cycle—Customs peons shouting for purpose of search—Rider of cycle escaping by side track—Offence whether constituted.

The obstruction referred to in S. 167 of the Sea Customs Act implies some actual resistance offered to the public servant in the discharge of his duties. Mere evasion or disobedience to a lawful order is not an obstruction to an officer who issues the order.

Where two customs peons who were stationed on a road to watch and arrest smugglers who were expected to pass along the road saw a bicycle being driven very fast along the road and they shouted that they were customs men and wanted to search but the cycle was ridden fast along a side track and did not stop, and the rider of the cycle was then prosecuted for an offence under S. 167 of the Sea Customs Act.

Held, that the omission of the accused to stop the bicycle did not constitute an obstruction to the Customs Officer and that he was not liable to be convicted under S. 167 of the Sea Customs Act.

Queen-Empress v. *Sommanna*, (1892) 2 M.L.J. 120: I.L.R. 15 Mad. 221 and *Emperor* v. *Aijaz Husain*, (1916) I.L.R. 38 All. 506, considered.

---

1. (1919) 10 L.W. 67. 2. (1901) 3 Bom.L.R. 132.

* Cr.R.C. No. 384 of 1936.
Cr.R.P. No. 355 of 1936. 9th November, 1936.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Sub-Divisional First Class Magistrate of Cuddalore in C. A. No. 3 of 1936, preferred against the judgment of the Court of the Stationary Sub-Magistrate of Cuddalore in C. C. No. 700 of 1935. Pattinathan, *In re.*

T. E. Ramabhadrachari and *K. Rama Ayyangar* for Petitioner.

The Public Prosecutor (*L. H. Bewes*) on behalf of the Crown.

The Court made the following

ORDER.—The petitioner in this case has been convicted of an offence punishable under S. 167, cl. 78 of the Sea Customs Act (VIII of 1878) according to which the offence is defined as follows:—

" If any person intentionally obstructs any officer of Customs or other person duly employed for the prevention of smuggling, in the exercise of any powers given under the Act to such officer or person".

The sentence imposed on the petitioner was modified in appeal into one directing him to execute a bond for his good behaviour for one year. The only question that is argued in this petition, and that is an important question, is whether the facts as alleged and proved by the prosecution constitute the offence in question, or to put it more clearly whether the facts constitute obstruction. The facts are briefly as follows. Two customs peons who were stationed on a road to watch and arrest smugglers who were expected to pass along the road saw a bicycle being driven very fast along the road and they shouted that they were customs men and wanted to search. In spite of this the cycle was ridden fast along a side track and did not stop. It is alleged that this non-stopping of the cycle of which the petitioner was the rider constitutes obstruction to the Customs Officer. It is not alleged that anything else was done by the petitioner which constitutes obstruction. The point therefore for decision is whether failure to stop when asked to stop by a Customs Officer who has the right to stop suspected smugglers is an obstruction to the Custom Officer. I have no doubt that this question has to be answered in the negative. Mere evasion or disobedience to a lawful order is not an obstruction to the officer who issues the order. Obstruction implies some actual resistance offered to the public servant in the discharge of his duties. Obstruction is under certain

Pattinathan, *In re.*

circumstances an offence under S. 186 and under certain other circumstances an offence under S. 225. I have been referred to two decisions relating to each of the two offences, namely, *Queen-Empress* v. *Sommanna*[1] and *Emperor* v. *Aijaz Husain*[2]. In my opinion reference to authorities is hardly required in dealing with a simple point like this. It seems to me hardly arguable that when a man runs away when asked to stop, he is obstructing the man who asked him to stop. It follows therefore that the facts alleged and proved in this case do not constitute the offence of which the petitioner has been convicted. The conviction of the petitioner must therefore be set aside. The direction to the petitioner to execute a bond for his good behaviour for one year is set aside and that bond is cancelled and the petitioner is acquitted.

B. V. V. —— *Accused acquitted.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Muthu Kr. Ar. Pl. Arunachalam Chettiar .. *Petitioner** (*Petitioner*)

v.

Kalayappa Chettiar and another.. *Respondents* (*Respondents*).

Arunachalam Chettiar *v.* Kalayappa Chettiar.

Civil Procedure Code (V of 1908), S. 73—Decree against father—Decree against father and sons—If against same judgment-debtor—No investigation as to binding nature of debt in decree against father.

A person who has obtained a decree against the father alone on a promissory note executed by the father is not entitled to rateable distribution out of sale proceeds representing the son's share obtained in execution of a decree passed against the father and son, as the decrees cannot be said to be against the "same judgment-debtor" within the meaning of S. 73 of the Civil Procedure Code, at any rate where the holder of the decree did not make the son a party even to his execution petition and it has not been found whether the decree was obtained on a debt binding against the son.

Ramakrishna Chettiar v. *Viswanatha Chettiar,* (1935) 69 M.L.J. 711: I.L.R. 59 Mad. 93 (F.B.), distinguished.

Petition under Ss. 115 of Act V of 1908 and 107 of the Government of India Act praying the High Court to revise the order of the Court of the Subordinate Judge of Dindigul dated the 23rd April 1934 and made in E. A. No. 153 of 1934 in E. P. No. 163 of 1933 in O. S. No. 34 of 1932.

---

1. (1892) 2 M.L.J. 120: I.L.R. 15 Mad. 221.
2. (1916) I.L.R. 38 All. 506.

* C. R. P. No. 1343 of 1934. 28th September, 1936

C. S. Venkatachari and *P. S. Sarangapani Aiyangar* for Petitioner.

T. P. Gopalakrishna Aiyar for Respondents.

The Court delivered the following

JUDGMENT.—The respondents in this petition attached the whole family property of the father and the son before judgment. A decree was obtained and the property was subsequently brought to sale and the purchase money deposited in Court. The father became insolvent and the father's share of the proceeds was handed over to the Official Receiver. Because the son's share had already been attached the father had no power over the son's share of the property and so the Official Receiver was allowed to take only the father's share of the proceeds. The petitioner, who obtained a decree against the father on a promissory note debt, has filed a petition for rateable distribution. The Subordinate Judge of Dindigul held that the petitioner could not be granted this relief.

The argument of the learned Advocate for the petitioner is that as the son is liable for his father's debt, it is not necessary for him to add the son as a party to execution proceedings against the family property, that his decree against the father must be considered to be a decree against the son also, and that he can therefore execute his decree against the son's share of the family property. S. 73 only applies to the execution of decrees against the same judgment-debtor; but I have been referred to a Full Bench decision in *Ramakrishna Chettiar* v. *Viswanatha Chettiar*[1] to the effect that the words "same judgment-debtor" must not be construed too strictly. There, one creditor obtained a decree against the father and then after his death added his two sons as his legal representatives, and a second creditor obtained a decree against the sons of the father after the father's death. It was held that in fact the decrees were against the estate of the deceased father and that it made no difference that in one case the name of the father was given and in the other the names of the sons. In the case under consideration the respondent has a decree against the son as well as the father, whereas the petitioner has a decree against the father only. In his execution petition, the petitioner did not even make the son a party on the ground that he was

1. (1935) 69 M.L.J. 711 : I.L.R. 59 Mad. 93 (F.B.).

Aruna-chalam Chettiar v. Kalayappa Chettiar.

liable for his father's debts, and we do not even know that the decree was obtained against the father for a debt binding on the son. In these circumstances I am not satisfied that the decree of the petitioner can be considered to be a decree against the son also, which alone would entitle him to rateable distribution.

The petition is therefore dismissed with costs.

S. V. V. —— *Petition dismissed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Ordinary Original Civil Jurisdiction.]

PRESENT:—SIR HORACE OWEN COMPTON BEASLEY, *Kt.*, *Chief Justice*, MR. JUSTICE MOCKETT AND MR. JUSTICE LAKSHMANA ROW.

(In Chambers.)

[*In the matter of* The Indian Income-tax Act XI of 1922

and

In the matter of The Assessment of Messrs. P. T. Chengalvaroya Chettiar and P. L. M. M. V. S. and Company, Madras]

The Commissioner of Income-tax, Madras .. *Petitioner**

v.

Messrs. P. T. Chengalvaroya Chettiar and another .. *Respondents.*

F.B.

Commissioner of Income-tax, Madras v. Chengalvaroya Chettiar.

Income-tax Act (XI of 1922), S. 44—Shell contract—Amounts payable in three instalments—Instrument describing it as 'the annual lease amount'—Whether revenue and not a capital expenditure—Jurisdiction of Income-tax Officer to assess the firm jointly and severally after partnership has discontinued.

An assessee firm by a deed dated 2nd July, 1930, got the exclusive right to excavate shells lying under Government property for three years for a payment of Rs. 30,000 odd payable by three instalments described in the instrument, for every one-third of the amount, as 'the annual lease amount'. Originally this amount of Rs. 30,000 odd was allowed to be deducted by the Income-tax Officer as being a payment out of revenue and not a capital expenditure. Subsequently having regard to *U. Chengalvaroya Mudaliar* v. *The Commissioner of Income-tax, Madras,* (1934) 7 I. T. C. 323, that allowance was cancelled and the sum treated as capital expenditure in the hands of the assessee. On a reference as to whether this amount was to be treated as capital expenditure and whether after the dissolution of the partnership of the assessee firm, the Income-tax Officer had jurisdiction to assess the firm as a unit and whether S. 44 of the Act gave him jurisdiction

* O. P. No. 187 of 1936. 4th December, 1936.

F.B.

Commissioner of Income-tax, Madras *v.* Chengalvaroya Chettiar.

to both make a joint and several assessment in respect of the shares of the individual partners,

Held, (1) that the facts of the case were not distinguishable from *U. Chengalvaroya Mudaliar* v. *The Commissioner of Income-tax, Madras,* (1934) 7 I. T. C. 323, since the words 'the annual lease amount' did not make any material difference or alter its nature.

(2) That the words in S. 44 of the Act 'tax payable' means "tax that is due to be paid" that is "tax which the firm or partnership would be liable to pay if it had not been discontinued", also "tax either found to be due already or that will be found to be due in the future". Hence the Income-tax authorities were correct in assessing the partners of the discontinued firm jointly and severally in respect of the profits carried by the firm before it was discontinued.

Case stated by the Commissioner of Income-tax, Madras, was as follows:—

I have the honour to refer the following case for the decision of the Hon'ble the Judges of the High Court under S. 66 (2) of the Indian Income-tax Act (XI of 1922) (hereinafter referred to as the Act).

The petitioners who constituted a firm were carrying on business in excavation and sale of chunam shells within the jurisdiction of the Income-tax Officer, Madras, III Circle. They entered into separate leases, one with the Government and the other with the Venkatagiri Samasthanam, by which they obtained the privilege of excavating chunam shells from certain lands belonging to the lessors. The leases were for a period of 3 years and expired in 1933. But the business continued till about May 1934 when the last stock was disposed of. The partners did not however settle their accounts till about July, 1935, and the firm became finally dissolved before the close of 1935.

For the tax year 1934-35 (previous year Calendar year 1933) the firm was originally assessed on a total income computed at Rs. 21,749 on 4th December, 1934. The firm disputed the correctness of the method followed by the Income-tax Officer in computing its income and filed an appeal to the Assistant Commissioner. But the Assistant Commissioner overruled the firm's contentions and dismissed the appeal by his order dated 8th February, 1935. The petitioner firm did not raise any objections to the assessment as confirmed by the Assistant Commissioner.

Subsequently on 27th March, 1935, the Income-tax Officer found that in computing the income as above the amount paid by the petitioner firm to the lessors, *viz.*, Rs. 30,450 to the Government and Rs. 43,987 to the Venkatagiri Samasthanam had been wrongly allowed in view of the decision of the Madras High Court in

F.B.

Commissioner of Income-tax, Madras v. Chengalvaroya Chettiar.

Chengalvaroya Mudaliar v. *Commissioner of Income-tax, Madras*[1]. He accordingly started proceedings under S. 34 and served a notice on the petitioner firm on 29th March, 1935. The petitioner firm then made a return showing a loss of over Rs. 30,000 and in regard to the proposal to make a supplemental assessment in respect of the lease amounts originally allowed as expenditure contended that the decision of the High Court mentioned above had no application to this case.

A copy of the instrument of lease dated 2nd July, 1930, under which the sum of Rs. 30,450 was paid to the Government is filed marked Ex. A. By clause (ii) of this agreement the petitioners agreed with the Revenue Divisional Officer to have the exclusive privilege of excavating chunam shells within the area specified in the agreement from 1st July, 1930 to 30th June, 1933, both days inclusive. Cl. (iii) of the agreement runs as follows:—

"The lessee shall pay into the Sub-Treasury at Sulurpet or at any Government Treasury the sum of Rs. 30,450 (Rupees thirty thousand four hundred and fifty) in twelve equal instalments payable in advance on the 21st day of July and October, 1930, January, April, July and October, 1931, January, April, July and October, 1932 and January and April, 1933, the annual lease amount being Rs. 10,150 (Rupees ten thousand one hundred and fifty) in consideration of the aforesaid exclusive privilege having been granted to him."

The agreement contained other clauses which are not relevant for a consideration of the point at issue in this case. The payments in question, *viz*., Rs. 30,450 were made on the dates specified in the agreement.

After hearing the petitioner firm's Advocate the Income-tax Officer held that the sums paid to the Government and the Venkatagiri Samasthanam ought to the treated as capital expenditure. He therefore added Rs. 74,437 to the income originally assessed and made a supplemental assessment accordingly on 23rd December, 1935. The notice of demand was served on one of the partners on the 10th January, 1936.

The petitioner firm appealed to the Assistant Commissioner and contended among other things—

(1) that the amount paid to the lessors was a deductible item of expenditure, and

(2) that the petitioner firm having been dissolved no assessment should have been made on the firm as such and that separate assessments if any should have been made on the individual partners of the firm on their respective shares in the profits of the business.

---

1. (1934) 7 I.T.C. 323.

F.B.

Commissioner of Income-tax, Madras v. Chengalvaroya Chettiar.

The Assistant Commissioner allowed Rs. 43,987 paid to the Venkatagiri Samasthanam and overruled the petitioner firm's objection in respect of the disallowance of Rs. 30,450. He accordingly reduced the assessment to Rs. 52,199. On contention (2) above he held that the assessment had been correctly made. An extract from his order is filed marked Exhibit B.

8. The petitioner firm now requires me to refer to the High Court 3 questions marked 1, 2 and 3 in the application for reference. I consider it unnecessary to refer question (3) in view of a prior decision of this Court reported in *The Commissioner of Income-tax, Madras* v. *Raja of Parlakimedi*[1], I accordingly refer questions (1) and (2) which are as follows:—

"(1) Whether the sum of Rs. 30,450 paid by the assessee to the Government under the instrument of lease dated 2nd July, 1930, is inadmissible as a revenue expenditure.

(2) Whether after dissolution of the partnership the Income-tax Officer had jurisdiction to assess the firm as a unit and whether S. 44 of the Act gives jurisdiction to the officer both to make a joint and single assessment or whether the individual partners alone are liable to be assessed in respect of their proportionate shares."

Question (1).—The facts of this case are similar to those in *Chengalvaroya Mudaliar's case,* decided by this Court (*Chengalvaroya Mudaliar* v. *Commissioner of Income-tax, Madras*[2]). The amount payable to the Government was a lump sum of Rs. 30,450 and what the petitioner firm obtained in return was the exclusive right to excavate chunam shells within a specified area for a specified period. As in the case mentioned above the payments in question were not made as an outlay in an already acquired business, in order to carry it on and to earn a profit out of this expense as an expense of carrying it on; but were made to acquire the business. The payments cannot be regarded as representing the cost of the shells excavated as they were not based on the quantity of shells excavated and were not in any way dependent on any excavation being made at all. The fact that the agreement mentions Rs. 10,150 as the "annual lease amount" does not in my opinion distinguish this case from *Chengalvaroya Mudaliar's case* mentioned above. The lease was for a period of 3 years and the amount payable to Government was a lump sum for the whole period, though it was made payable in 12 equal instalments, as in Chengalvaroya Mudaliar's lease (please *see* paragraph 3 of the agreement in that case, Exhibit A, *Chengalvaroya Mudaliar* v. *Commissioner of Income-tax, Madras*[2]). The facts of this case being substantially the same as those in the case mentioned above, the question should, in my opinion, be answered in the affirmative.

1. (1925) 2 I.T.C. 104. 2. (1934) 7 I.T.C. 323 at 325.

F.B.

Commissioner of Income-tax, Madras v. Chengalvaroya Chettiar.

Question (2).—It is not disputed that during the 'previous year' in question the petitioner firm carried on a business and made profits therefrom. Under S. 3 of the Act such profits are liable to be assessed in the name of the firm. The Income-tax Officer started proceedings in time by serving the necessary notice on the firm but before he could complete the assessment the firm was dissolved. The notice of demand was therefore served on one of the ex-partners. The question arises whether the assessment made under such circumstances is legal. It appears to me that S. 44 of the Act was intended to meet such a case, and that it imposes a liability on the partners of a defunct firm to submit to an assessment made in the name of the firm. It will be noted that this section forms part of Chapter V which is headed "Liability in special cases". The argument on behalf of the petitioners is that this section merely provides for recovery from the ex-partners of tax imposed on the firm before its dissolution. But if this were so the provision would naturally occur in Chapter VI (headed "Recovery of Tax and Penalties") and not in Chapter V; and moreover this section regarded as mere machinery for collection is *otiose*, for when an assessment has been made on the firm the tax demanded is a debt due by the firm, and the partners after dissolution are under the general law (Contract Act, S. 249; now S. 45 of the Indian Partnership Act) jointly and severally liable for all such debts. It appears to me therefore that this section like the other sections in the same chapter of the Act, creates a liability to assessment. The profits to be assessed, according to the section, are those of the firm, and the tax due on such assessment may be recovered from any or all of the ex-partners.

M. Patanjali Sastri for Petitioner.

M. Subbaroya Aiyar for Respondents.

The Court delivered the following

JUDGMENT.—Two questions have been referred to us by the Commissioner of Income-tax, *viz.*:—

"(1) Whether the sum of Rs. 30,450 paid by the assessee to the Government under the instrument of lease dated 2nd July, 1930, is inadmissible as a revenue expenditure; and

"(2) Whether after dissolution of the partnership the Income-tax Officer had jurisdiction to assess the firm as a unit and whether S. 44 of the Act gives jurisdiction to the officer both to make a joint and several assessment or whether the individual partners alone are liable to be assessed in respect of their proportionate shares".

With regard to question No. 1, the facts are quite sufficiently stated by the Commissioner of Income-tax in his letter of reference, but, quite briefly they are that the assessee by a deed

F.B.

Commissioner of Income-tax, Madras *v.* Chengalvaroya Chettiar.

dated the 2nd July, 1930, got the exclusive right to excavate shells lying under Government property for three years for a payment of Rs. 30,450 payable by certain instalments and described in the instrument as regards Rs. 10,150 (being one-third of the amount stated) as "the annual lease amount". This sum of Rs. 30,450 was originally allowed to be deducted by the Income-tax Officer as being a payment out of revenue and not a capital expenditure. Subsequently, having regard to this High Court's decision in *U. Chengalvaroya Mudaliar* v. *The Commissioner of Income-tax, Madras*,[1] that allowance was cancelled and the sum was treated as a capital expenditure in the hands of the assessee. Hence this reference. In our view, the facts of this case are not distinguishable from the facts in *Chengalvaroya Mudaliar's case.* There it was held that having regard to the instrument, the expenditure was an initial expenditure without which the assessee could not even have begun winning the shells and it was, therefore, a capital expenditure. We have had addressed to us a strenuous argument by Mr. Subbaroya Aiyar that there is a very material distinction between the words in the instrument in this case to those in *Chengalvaroya Mudaliar's case.* He contends that as the words "annual lease amount" appear in the instrument in question here and do not appear in the instrument in *Chengalvaroya Mudaliar's case,* it renders the agreement in question a rental agreement and that full significance must be given to the words "annual lease amount" and they must be taken as showing that the payment to be made under the instrument was a payment by way of rent and therefore a revenue expenditure and not a capital expenditure as in *Chengalvaroya Mudaliar's case.* We are unable to see that those words make any material difference. The transaction in question is exactly the same as that in *Chengalvaroya Mudaliar's case* and the use of the words "annual lease amount" does not, in our opinion, alter its nature. The answer to the first question must be in the affirmative.

With regard to the second question, the assessment here was made by the Income-tax authorities under S. 44 of the Act which reads as follows:—

"Where any business, profession or vocation carried on by a firm has been discontinued, every person who was at the time of such discontinuance

1. (1934) 7 I. T. C. 323.

F.B.

Commissioner of Income-tax, Madras v. Chengalvaroya Chettiar.

a member of such firm shall be jointly and severally liable for the amount of the tax payable in respect of the income, profits and gains of the firm".

The object of that section is perfectly clear. It is to enable the tax on the profits of a firm which has been discontinued to be got by the Income-tax authorities and to prevent the avoidance of taxation, by the discontinuance of the firm. The words are, in our opinion, perfectly clear but Mr. Subbaroya Aiyar contends that unless an assessment upon the firm has already been made before its discontinuance, which is not the case here the partners of it cannot be assessed jointly after its discontinuance, because according to him the words "tax payable" in the section mean "payable as the result of an assessment already made upon the firm". If this contention is correct, it leads to a strange result. The object of the section being perfectly clear, *viz.*, to get at the tax on the profits of the firm made before its discontinuance, and bearing in mind that that is its object, the result of the contention, if correct, would be that the tax recoverable would be less than that recoverable if the business had not been discontinued. In such a case the tax would have been upon the profits of the business but if a separate assessment is made upon the partners separately and not jointly after the discontinuance of the business it is conceded that the tax recoverable would be less. We are unable to see why the fact that an assessment has not been made upon the firm previous to its discontinuance should bring about such a result. It seems to us that "tax payable" means "tax that is due to be paid", "tax which the firm or partnership would be liable to pay if it had not been discontinued"; "tax either found to be due already or that will be found to be due in the future". That being so, we are clearly of the opinion that the Income-tax authorities were correct in assessing the partners of the discontinued firm jointly and severally in respect of the profits earned by the firm before it was discontinued.

Question No. 2 is answered accordingly.

The Income-tax Commissioner will get Rs. 250 costs.

K. C. *Questions answered in the affirmative.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VARADACHARIAR.

Karuppa Goundan and another .. *Appellants* in both (Defendants)*

v.

Jaganmandalathipathi, Gopanna Manradiar, Minor, Zamindar of Poravipalayam represented by the Manager, Court of Wards .. *Respondent in both (Plaintiff in both).*

Karuppa Goundan *v.* Gopanna Manradiar.

Court of Wards Act (I of 1902), Ss. 8 and 52—Suits on behalf of Ward by Collector—Sanction of the Court of Wards previous to filing not obtained—Similar suits already filed with previous sanction—Collector's responsibility—Whether third parties can take advantage of the contravention if at all of the provisions of S. 52 of the Act.

The provisions of Chapter VI of the Court of Wards Act are provisions which third parties cannot take advantage of. They are primarily meant for the benefit of the Ward and not for the benefit of third parties, though some of them may impose restraints upon third parties in the interests of the Ward. The provision in S. 52 can by no means be regarded as taking away the jurisdiction of the Civil Court to deal with the matter, whatever responsibility a manager might incur, if he should institute a suit in contravention of the provisions of S. 52. The proviso to that section that to avoid the bar of limitation a manager may file a suit even before obtaining sanction of the Court of Wards is itself an indication that restrictions of this kind cannot be regarded as matters going to the jurisdiction of Civil Court. The authorisation required by S. 52 is no doubt stated to be one from the Court of Wards but S. 8 provides not merely that the Court may exercise its process through the District Collector but also that it may confer its powers on any such Collector.

Where the Collector took upon himself the responsibility of instituting suits on behalf of a Ward and it was obvious that he acted in accordance with the Court of Ward's proceedings in other similar suits filed already by them,

Held, that there could be very little doubt that the present suits were similar to the ones instituted with the previous sanction of the Court of Wards and hence the suits should be held to have been in accordance with the provisions of S. 52 of the Court of Wards Act.

R. 137, Court of Wards Manual (Notes), referred to.

Appeals against the decree of the District Court of Coimbatore in Appeal Suits Nos. 218 and 219 of 1931 respectively preferred against the decrees of the Court of the District Munsiff (Additional) of Coimbatore in Original Suits Nos. 919 and 920 of 1929 respectively.

V. V. Srinivasa Aiyangar and *V. V. Ramadurai* for Appellants.

---

* S.A. Nos. 28 and 29 of 1933. 12th November, 1936.

V. K. Thiruvenkatachari for Respondent.

The Court delivered the following

JUDGMENT.—These two second appeals arise out of suits in ejectment instituted on behalf of a minor whose estate is under the Management of the Court of Wards. The questions of fact arising in the case are concluded by the concurrent findings of the Courts below.

The only question of law raised in these second appeals is that referred to as Point No. 1 in paragraph 2 of the lower appellate Court's judgment, namely, whether in view of the provisions of S. 52 of the Court of Wards Act, these suits are maintainable in the absence of express sanction from the Court of Wards.

I may at the outset state that I am not by any means satisfied that the provisions of Chapter VI of the Court of Wards Act are provisions which third parties can take advantage of. They are primarily meant for the benefit of the ward and not for the benefit of third parties, though some of them may impose restraints upon third parties in the interests of the ward. The provision in S. 52 can by no means be regarded as taking away the jurisdiction of the Civil Court to deal with the matter, whatever responsibility a manager might incur if he should institute a suit in contravention of the provisions of S. 52. The proviso to that section that to avoid the bar of limitation a manager may file a suit even before obtaining the sanction of the Court of Wards is itself an indication that restrictions of this kind cannot reasonably be regarded as matters going to the jurisdiction of the Civil Court. It is not however necessary to come to any final conclusion on this aspect of the matter, because the documentary evidence in the case suffices to establish that the suit has been instituted with proper authority. The authorisation required by S. 52 is no doubt stated to be one from the Court of Wards but S. 8 provides not merely that the Court may exercise its powers through the District Collectors but also that it may confer its powers on any such Collector.

As regards institution of suits on behalf of the Ward, the provision in r. 137 of the Madras Court of Wards Manual is to the effect that when difficult or doubtful points of law or special important issues are involved, the manager should obtain the sanction of the Collector before instituting the suit

and whenever in the Collector's opinion, the matter is of sufficient importance, the Court's sanction should be obtained. Even if the above had stood by itself, an authorisation by the Collector would be good because the rule leaves it to his discretion as to whether or not he should obtain the Court's sanction in a particular case. In the notes to that rule, reference has been made to Proceedings No. 3674 dated 14th November, 1893 and to Proceedings No. 48 dated 4th September, 1911, the result of which is stated as follows:—

> "When the Court of Wards has approved the institution of a suit and the draft plaint to be filed in it, Collectors may themselves authorise the institution of suits in similar and connected cases arising subsequently".

This is apparently what happened in the present case. Ex. M shows that the Collector has been in correspondence with the Court of Wards in respect of steps to be taken for the recovery of several items of land belonging to the temple under the management of the ward. Suits were sanctioned in respect of some items but it was apparently expected at that time that in respect of one item now in suit a litigation might not be necessary if the present defendant in O. S. No. 920 of 1929 would agree to execute a lease in respect of the land in his possession. This was apparently not done and hence both the suits now before me had to be instituted. Ex. M-1 shows that the District Collector took upon himself the responsibility of sanctioning the institution of these two suits. Reading Exs. M and M-1 together, it is obvious that the Collector acted in accordance with the Court of Wards proceedings above set out, because there can be very little doubt that these suits are similar to the ones whose institution had been sanctioned by the Court of Wards as recorded in Ex. M.

The Lower Appellate Court was therefore right in holding that the suits have been instituted in accordance with the provisions of S. 52 of the Court of Wards Act.

The Second Appeals accordingly fail and are dismissed with costs.

Leave to appeal is refused.

K. C. —— *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VARADACHARIAR.

Boodapati Ankamma, wrongly described as Nannuru Ankamma in the decree and judgment of the lower Court .. *Appellant** *(Plaintiff)*

v.

Boodapati Bamaneppa .. *Respondent (Plaintiff).*

Ankamma *v.* Bamaneppa.

Hindu Law—Marriage—Boy forced to tie thali *and go through ceremonials of marriage by compulsion—If marriage effected thereby—Effect of subsequent living as man and wife—Ceremonies gone through by boy willingly —Boy aged 18 or 20—Parents opposed to marriage—Valid.*

Where a person is forced to go through a marriage form to which he objects, and is compelled by some people assembled there to sit on a plank and his hand is then seized by one of them and made to tie the *thali* round the girl's neck, no legal relationship of husband and wife is thereby created between the parties, by whatever ceremonial gone through at the time.

Though a Hindu marriage is a sacrament and not a contract and therefore the principles of contract law are not fully applicable to it, it cannot therefrom be argued that even fundamental principles like freedom of consent by some responsible person, if not by the spouses themselves, ought to be ignored. If a person never intended to go through the form of marriage, which he is compelled to go through as a kind of automaton, he cannot be held to have gone through the marriage at all. But if after this form, the parties live in fact as man and wife for a time, then the marriage will be valid, as any *locus penitentiae* that the husband might have been entitled to on the footing of being an unwilling party, he must be held to have lost by having chosen to live with the girl as husband for a time.

If the marriage was a deliberately planned affair by the boy himself (here he was then 18 or 20 years old) and the boy went through the form of marriage of his own freewill, then the marriage will be valid whatever defects of ceremonial there might have been and notwithstanding the objection of the boy's parents to any such alliance.

Appeal against the decree of the District Court of Nellore in Appeal Suit No. 186 of 1931 presented against the decree of the Court of the District Munsiff of Kanigiri in O. S. No. 800 of 1930.

Ch. Raghava Rao for Appellant.

G. Lakshmanna and *G. Chandrasekara Sastri* for Respondent.

The Court delivered the following

JUDGMENT.—Much as I pity the lot of the unfortunate appellant who had been made a pawn in a discreditable game played by some of her misguided relatives, I do not find any

* S. A. No. 1011 of 1932. 6th November, 1936.

Ankamma v. Bamaneppa.

ground on which I can interfere with the decision of the lower Appellate Court.

The plaintiff sued for a declaration that the defendant was not his legally wedded wife; and the allegations in the plaint imply either that there was no marriage in fact or in any event it did not amount to a valid marriage. It is common ground that the marriage, if any, took place under abnormal circumstances. The plaintiff was undoubtedly a young man—it makes very little difference whether he was 18 or 20 at the time and the defendant's witnesses agree that the plaintiff's parents who were well-to-do parents were not likely to agree to his marrying the defendant. It is accordingly the defendant's story that the marriage took place one evening in a stranger's house at a village four or five miles away from the village of the parties. D. W. 1 was the man who brought about the transaction. The defendant and her brother D. W. 5 were the only persons who on the bride's side went to that village in advance. The plaintiff admittedly came to that village in the company of D. W. 1 after the defendant and her brother had reached there, and it is then said that certain rites were gone through. It is also the defendant's story that after nightfall the plaintiff and the defendant returned to their own village, but instead of going to the plaintiff's parents' house, the party returned to the defendant's house where the plaintiff and the defendant lived as man and wife for three days. The suggestion of the defendant is that this suit which was instituted within fifteen days after the events above referred to was instigated by the plaintiff's parents.

On the other hand, it is the plaintiff's story that not merely his parents but he himself was never a willing party to this alliance, that the proposal was never mentioned to him till he actually found himself in the house in the neighbouring village that evening, that he was decoyed to that village by D. W. 1 on a representation that he was merely going in search of a lost cow, that when he found himself in that house in the evening he was surrounded by people who had been got ready there beforehand, that it was only then that he was asked to go through a marriage form to which he objected, that he was compelled by some of the people assembled there to sit on the plank, that his hand was seized by D.W. 1 and made to tie the *thali* round the defendant's neck. He denies that he returned

Ankamma *v.* Bamaneppa.

to the bride's house that evening or lived with her as man and wife for three days as alleged.

But for the tragic consequences, one may enjoy the humour of the story related by D. W. 1. I cannot help observing that on their own showing D. W. 1 and D. W. 5 have no right to complain if any Court refused to believe that evidence. The District Munsiff came to the conclusion that the marriage was a deliberately planned affair by the plaintiff himself with the help of D. W. 1 and that the plaintiff went through the marriage of his own freewill. On that finding there can be little doubt that the marriage will be valid, whatever defects of ceremonial there might have been and notwithstanding the objection of the plaintiff's parents to any such alliance. On appeal however the learned District Judge came to a different conclusion.

There are portions of the appellate judgment which are open to criticism. If the matter rested merely upon the question of defect of ceremonies, or the omission to go through the round of ceremonies which according to the description in Thurston's book it is usual to observe in Kamma marriages, I should not have been prepared to hold that the marriage is legally invalid. I am also free to confess that the statement in paragraph 15 of the lower Appellate Court's judgment, that circumstances like secrecy, haste, absence of festivities, etc., are *invalidating* circumstances, is putting the matter too high. At best, they can only be described as suspicious circumstances having an important bearing on the question of fact. But in paragraph 6, the lower Appellate Court has found that the plaintiff could not have with his freewill and consent entered into relationship of marriage with the defendant and that, if at all, there was only a farce of a marriage brought about by fraud or force on the part of D. W. 1 and his partisans. Here again, there is some room for the criticism that the expression "fraud" or "force" has been used by the learned Judge, without any clear indication of the elements which in his opinion constituted them, apparently because that expression is found in some of the reported cases bearing upon the question of the invalidity of the marriage. 'Fraud' in the sense defined by the Contract Act is difficult to find in the case. Fraud perhaps in a wider sense may be applied to this transaction if the plaintiff's story is true.

Ankammal
v.
Bamaneppa.

Dealing first with the question of fact, I do not feel that it is open to me to consider whether the version of the plaintiff is more likely or the version given by the defendant's witnesses is more likely. The case is according to both sides abnormal and the departure from the customary form of ceremonies will accordingly afford no criterion for decision. It is obvious that the learned District Judge intended to accept the plaintiff's testimony and I cannot say that he ought not to have accepted it. In substance, the story as accepted by the learned Judge seems to me to amount to this (in the words of the summary of the plaint given in paragraph 1 of the first Court's judgment, namely), that, on some pretext, the plaintiff was taken to the neighbouring village by D. W. 1 that D. W. 1 and D. W. 5 had without the plaintiff's knowledge made arrangements there beforehand for some of the formalities of the marriage ceremony, that when the plaintiff found himself in that house he was asked to marry the defendant to which he did not agree and that while this conversation was going on the plaintiff was asked to tie the *thali* to the defendant which he refused to do, that thereupon D. W. 1 held the plaintiff's hand and made him tie the *thali* to the defendant, that the plaintiff thereafter ran away from the place to his parent's house. If this is to be taken to be the true version, I am not able to say that the learned Judge was wrong in holding that there was no legal relationship of husband and wife created between the parties by whatever ceremonial gone through at the time.

If I were satisfied as to the truth of the defendant's story that after the events of the evening, the plaintiff and defendant did in fact live as man and wife for a period of three days, I should have unhesitatingly upheld the marriage, because at best the plaintiff would have only been a reluctant party to the ceremony and any *locus penitentiae* that he might have been entitled to on that footing he must be held to have lost by having chosen to live with the lady as husband for a time. Even the learned District Munsiff does not seem to have accepted that version and the District Judge clearly rejects it. So far it is open to me to look into the evidence, I have examined it carefully and I am not satisfied that that part of the story is wholly reliable. The three days' period seems to me to have been suggested by the fact that three days after this incident, the plaintiff joined his father in the execution of certain gift deeds in favour of his sisters. D. W. 1 admits,

though D. W. 5 denies, that that very evening the plaintiff's parents were on the track with a view to prevent the marriage if possible. D. W. 1 would have it that the parents came to the defendant's house in the night and rebuked them though D.W. 5 would deny even that. Having regard to the plaintiff's subsequent conduct and the position of the plaintiff's family and the proximity of their house, I find it difficult to accept the defendant's version that the plaintiff was allowed to remain in the defendant's house for three days.

Mr. Raghava Rao asked me to say that the plaintiff's evidence at best only shows that he reluctantly submitted to a proposal put before him by D. W. 1 and D. W. 5. I do not think that is a correct statement of the effect of the evidence. The plaintiff's evidence, if true, implies that his hand was merely moved by D.W. 1 and that the plaintiff by himself had no voluntary part in the matter. Mr. Raghava Rao next contended that even if this should be taken to be the finding of the Lower Appellate Court on the evidence, the Court is not justified in applying to a Hindu marriage the principles of the law of contract and holding the marriage to be inoperative or void. I agree that the Hindu marriage is a sacrament and not a civil contract and that it will not be permissible to apply to a Hindu marriage all the principles of the law of contract, at least for the reason that in most marriages sanctioned by the Hindu Law the infant spouses have no contracting capacity. It seems to me, however, too much to argue from this that even fundamental principles like freedom of consent by some responsible person if not by the spouses themselves, ought to be ignored. I am not for a moment saying that the absence of the parent's consent will always invalidate the marriage. According to the plaintiff's case the plaintiff was never a willing party to the marriage and if on the evidence the Court holds that he never wanted to be a party to the marriage, the mere fact that somebody else caught hold of his hand and made it tie a *thali* round the lady's neck ought not, it seems to me, to be held to constitute a marriage, because it will be making a travesty of the so-called sacrament.

The reported decisions no doubt happen to be instances of objections raised from the point of view of the bride, such as absence of consent by her father and so on, and they have therefore laid stress upon the necessity for the *gift* of the girl

by some competent person. But there is no reason to hold that that is the only possible kind of invalidation. In cases like *Khushalchand Lalchand* v. *Bai Mani*[1]; *Brindabun Chandra Kurmokar* v. *Chandra Kurmokar*[2]; *Venkatacharyulu* v. *Rangacharyulu*[3]; and in the observations of Sir Gurudas Banerji (on pp. 56 and 57 of the 5th edition of his Book on Marriage) a reservation has been made in respect of ceremonial brought about by fraud or force. There is no scope here for the application of the principle of *factum valet*, therefore this is not a case of a mere violation of some 'directory text'. Ankamma *v.* Bamaneppa.

Mr. Raghava Rao suggested that if one is to apply the principles of the law of contract, fraud or coercion must have been exercised by the other party to the contract and that it is not the case here. As I am not proceeding on the theory that the law of contract as such is applicable to the present case, I do not feel pressed by this contention. It seems to me that whoever may be responsible for it, if the husband never intended to go through the form which he is compelled to go through as a kind of automaton, he cannot be held to have gone through the marriage at all. In this view, I must hold that the Lower Appellate Court was right in decreeing the plaintiff's suit.

The second appeal fails and must be dismissed with costs.

I willingly grant leave, in the hope that during the pendency of the appeal the parties will have the good sense to come to some honourable settlement or at least that the appellate Court may find some way of helping the appellant.

S. V. V. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VARADACHARIAR.

Khaji Dodda Khaji Saib and others .. *Appellants** (*Defendants*)

v.

Chigamalla Nanjappa and others.. *Respondents* (*Plaintiffs*).

Injunction—Building of a mosque in a Hindu locality—If ipso facto *a nuisance—Attitude taken by Mahomedans not conducive to peaceful living—Civil Court, if can restrain user of building as mosque—*Sic uteri tuo ut alienum non laedas—*Limits of.* Khaji Dodda Khaji Saib *v.* Nanjappa.

---

1. (1886) I.L.R. 11 Bom. 247. 2. (1885) I.L.R. 12 Cal. 140.
3. (1890) 1 M.L.J. 85: I.L.R. 14 Mad. 316.

* S. A. No. 1194 of 1932. 2nd November, 1936.

Khaji Dodda Khaji Saib *v.* Nanjappa.

To the rule that persons are at liberty to build what structures they please upon their own land and use them for religious worship as they chose certain exceptions have been recognised, namely, (1) that in the performance of their worship they do not cause material annoyance to their neighbours, and (2) that no public nuisance is caused. But it is not merely on the ground of nuisance that the Court can impose limitations on the user of a building in a case of this kind.

Where in the midst of a Hindu locality, a construction was put up by some Mahomedans and it was intended to declare it and use it as a *mosque*, such user may not *ipso facto* be a nuisance or amount to an obnoxious user having regard to the character of the neighbourhood. But where it is found as a fact on the evidence, from the attitude taken up by the Mahomedans in respect of their rights, that it would be impossible for the communities to peaceably enjoy their respective rights, the Civil Court is entitled to restrain by injunction the defendant, owner of the building, from declaring it to be a mosque. Considerations of sentiments of parties and damage to public peace are not wholly out of place in the proper application of the maxim "*Sic uteri tuo ut alienum non laedas*".

Second appeal against the decree of the District Court of Bellary in Appeal Suit No. 13 of 1931 preferred against the decree of the Court of the District Munsiff of Hospet in O. S. No. 272 of 1929.

V. S. Narasimhachar for Appellants.

K. Umamaheswaran for Respondents.

The Court delivered the following

JUDGMENT.—This second appeal arises out of a suit brought on behalf of the Hindu residents of a village in Bellary District for an injunction restraining the defendants from constructing a Jumma Masjid which they proposed to erect on a plot shown in the plan attached to the plaint and also for a declaration of the rights of the Hindus to carry certain processions, etc., along the routes indicated in the plan. When the matter was pending before the Court of first instance, the District Munsiff refused to grant a temporary injunction restraining the completion of the building and when the matter came on for final disposal before him, he limited the injunction to one restraining the defendants from declaring that building to be a mosque. He also granted a declaration in respect of the plaintiff's rights as regards processions, etc. The learned District Judge has confirmed the decree of the District Munsiff. Hence this appeal by the defendants.

The second appeal has been pressed only in respect of the injunction restraining the use of the building as a mosque. On behalf of the appellants, Mr. Narasimhachar, drew my attention to the proposition laid down as early as in *Kasim*

Khaji Dodda Khaji Saib *v.* Nanjappa.

Ali Khan v. *Brij Kishore*[1] and *Seshayyangar* v. *Seshayyangar*[2] that parties are at liberty to build what structure they please upon their own land and use them for religious worship as they choose. The statement of the rule in *Seshayyangar* v. *Seshayyangar*[2] is qualified by the addition, "provided that, in the performance of their worship they do not cause material annoyance to their neighbours". In *Parthasarathi* v. *Chinnakrishna*[3] this view was affirmed, with the further addition to the proviso that "no public nuisance is caused". I am unable to accede to the suggestion made on behalf of the respondents that the use of the building as a mosque will *ipso facto* be a nuisance or amount to an abnoxious user having regard to the character of the neighbourhood; but I am not satisfied that it is only on the ground of nuisance that the Court can impose limitations in a case of this kind.

The decisions above referred to are only illustrations of the well-known maxim quoted by the learned District Judge "*Sic uteri tuo ut alienum non laedas*". As observed in Broom's Legal Maxims (9th Edition) at p. 260 the principle is one essential to the peace, order and well being of the community, and its application has to be determined with reference to the circumstances of each case and not on mere abstract considerations. I quite agree with the principle recognised in *Janki Prasad* v. *Karamat Husain*[4] that a Civil Court is not concerned with mere matters of sentiment or even with danger to the public peace which it is for the magisterial authority to provide against. But it seems to me that in the proper application of the maxim above referred to these considerations are not wholly out of place. In the decision in *Muhammad Hussain* v. *Baba Sah*[5] to which the appellants' learned counsel drew my attention, the learned Judges pointed out that in the absence of evidence to the contrary they were not prepared to make any presumption that the proposed structure will be improperly used. It must also be remembered that in that case the Hindu temple complained of was already in existence and all that was proposed was the addition of a mantapam. In *Syed Pitchai Rowther* v. *Devaji Rao*[6], Horwill, J., laid some stress upon the fact that in the case before him there was nothing in

1. (1870) 2 N.W.P. 182.
2. (1880) I.L.R. 2 Mad. 143.
3. (1882) I.L.R. 5 Mad. 304.
4. A.I.R. 1931 All. 674.
5. A.I.R. 1926 Mad. 336.
6. (1936) 71 M.L.J. 611.

Khaji Dodda Khaji Saib v. Nanjappa.

the evidence to indicate that it would be impossible for both parties to enjoy their respective rights. I wish that in the present case it had been possible for me to come to the same conclusion. Both the Courts below have referred not merely to what is known as the general consequence of the erection of a mosque for the first time in a Hindu locality, but to the indications afforded by the evidence in the case as to the attitude taken up by the defendants in respect of rights which the Hindus of the locality had theretofore been accustomed to enjoy. In the face of the findings based upon such considerations, I do not feel I will be justified in interfering with the decision of the lower Court merely upon abstract theories of legal rights.

The second appeal therefore fails and is dismissed with costs.

Leave to appeal granted.

S. V. V. —— *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Bombay.]

PRESENT:—LORD ATKIN, LORD THANKERTON, SIR SHADI LAL, SIR GEORGE RANKIN AND SIR GEORGE RICH.

The Commissioner of Income-tax, Bombay Presidency and Aden, and others .. *Appellants**

v.

The Bombay Trust Corporation, Limited .. *Respondents.*

P.C.

The Commissioner of Income-tax, Bombay Presidency and Aden v. The Bombay Trust Corporation, Ltd.

Income-tax—Assessment on non-resident company under S. 42 in the name of another company as agent—Claim that profits or gains accrued to it through the agent company—Absence of evidence to support it—Assessee's books, etc., not unbelievable—Income-tax officer to consider the issue in the light of what parties actually did or agreed to—High Court holding there was no evidence—Commissioner then directing further enquiry—If legal—Income-tax officer calling for account books of foreign company again—Non-production of—Assessment under S. 23 (4)—Validity of—Application under S. 27 to set aside assessment—Appeal to Assistant Commissioner—Both adjourned pending disposal of appeal to Privy Council—If proper—Order under S. 49 (a)—Petition under S. 45, Specific Relief Act, if maintainable against the Commissioner.

Before 1926, the H. K. Co., a company registered and situate outside British India, was lending large sums to the Bombay Co., on deposit for

---

* P. C. Appeals Nos. 85 of 1935 and 1 of 1936. 17th July, 1936.

P.C.

The Commissioner of Income-tax, Bombay *v.* The Bombay Trust Corporation, Ltd.

interest and the Bombay Co. was remitting the interest duly every year. It was held in *Commissioner of Income-tax, Bombay* v. *The Bombay Trust Corporation, Ltd.*, (1929) 58 M.L.J. 197: L.R. 57 I.A. 49: I.L.R. 54 Bom. 216 (P.C.), that such interest was a profit or gain which accrued or arose to the H. K. Co. from a business connection in British India and that H. K. was chargeable to income-tax in the name of the Bombay Co. under S. 42. The H. K. Co. was likewise assessed for the year 1927, but the Bombay Co. contended that it was not then liable as H. K. Co.'s agent as it had changed its financier from H. K. Co. to E. D. S. Co., Shanghai branch and there were no loans received by Bombay Co. from H. K. Co. The income-tax authorities would not accept it and assessed the Bombay Co., notwithstanding (1) entries in the firm's books made upon the footing that there were no longer any loans from H.K. Co., but only loans from Shanghai branch of E. D. S. Co., and (2) declarations from H. K. Co. and E.D.S. Co., Shanghai, to that effect. On a case stated under S. 66 of the Income-tax Act, the High Court on 29th August, 1933, held that there was no evidence to support the assessment. Against that order appeal (P.C.A. No. 1 of 1936) was filed.

On 16th January, 1934, the Commissioner directed the Assistant Commissioner to take back the assessee's appeal to his file, to set aside the assessment and to direct the income-tax officer to make a fresh assessment after making such further enquiry as he might think fit. He also directed that the tax paid should be refunded if E.D.S. Co. should hold itself responsible for repayment, if necessary. Pursuant to that, the income-tax officer called on the Bombay Co. to produce the books of account of H.K. Co., for the year ending December, 1927. The assessee objected to the procedure as unwarranted. But on 20th February, 1934, the officer made an assessment under S. 23 (4) and acting under S. 49 (A) purported to set off the amount due upon the fresh assessment against the refund due to the assessee. The assessee (Bombay Co.) applied under S. 27 to set aside that order, and also appealed to the Assistant Commissioner. But the authorities adjourned these (appeal and petition under S. 27) till after the P.C.A. No. 1 of 1936 was decided. Thereupon the Bombay Company applied to the High Court under S. 45 of the Specific Relief Act for an order directing (1) the Commissioner to refund the tax paid, (2) the Assistant Commissioner to hear the appeal, and (3) the income-tax officer to hear the petition under S. 27. On 19th September, 1934, the High Court directed the Commissioner to set aside the assessment and refund the tax to the assessee but did not deal with the other prayers as unnecessary. The formal order was made in the terms "that the 1st respondent do repay to the petitioners the sum of Rs. 3,17,187-8-0 with interest", that being the amount of tax collected. As against this, P.C. Appeal No. 85 of 1935 was preferred by the Commissioner.

Held, that the original assessment was bad. This was not a case in which there was any evidence to show that the entries in the assessee's books were false or inconsistent or that the correspondence of October and November, 1926, between the companies was unreal. On the other hand they were supported by the declarations of the H.K. Co. and E.D.S. Co., for which the Assistant Commissioner had asked. The income-tax authorities must decide the question according to the legal rights resulting to the parties from what they in fact did or agreed to, and in the absence of positive evidence, they cannot by merely refusing to believe the assessee, hold positively that in 1927 the H.K. Co. was in receipt of profits or gains from the Bombay Co.

Held, on the mandamus appeal, that it was not obligatory on the Commissioner to discontinue all proceedings, against the assessee. As the

P.C.

The Commissioner of Income-tax, Bombay *v.* The Bombay Trust Corporation, Ltd.

whole question at issue was whether or not the H.K. Co., or the Bombay Co., as its agent, were liable to be assessed at all, it was an inappropriate form of order to direct the income-tax officer to make a fresh assessment after making such further enquiry as he thought fit but in substance the Commissioner was "within his rights" in directing further enquiry, as he can do so if he thought such enquiry to be reasonable and profitable in the public interest. The other orders, namely, imposition of a condition of refund of the tax that E.D.S. Co. should hold itself responsible, the assessment under S. 23 (4) and the refusal to deal with the petition and appeal until disposal of the appeal to the Privy Council were open to criticism.

Held, further, that the formal order dated 19th September, 1934, was inartistic. It should not have ordered the Commissioner to repay but should have only directed him to deal with the case under S. 66, cl. (5) and to cause to be recorded an order allowing refund.

The order passed under S. 49 (A) should have been got rid of not by applying to the Court direct under S. 45 of the Specific Relief Act but by proceedings under S. 27 of the Income-tax Act.

S. 45, cl. (*g*) of the Specific Relief Act does not mean that orders can be made on a servant of the Crown to enforce the satisfaction of a claim upon the Crown provided the Court acts with some additional motive or has some further intention, namely, to ensure that Court's orders were not ignored. Before the Court can command a public servant it must be shown that he had a duty towards the petitioner for mandamus imposed by statute apart from any duty that he may owe to the Crown as its servant.

The mandamus appeal was allowed and the other appeal was dismissed.

These are consolidated appeals from two judgments of the High Court of Judicature at Bombay, the one passed on 29th August, 1933, under S. 66 of the Income-tax Act (XI of 1922), and the other passed on 19th September, 1934, upon an application made by the respondent company in certain proceedings headed " In the matter of the Specific Relief Act, 1877".

The facts are set out fully in the judgment of their Lordships:—

A. M. Dunne, K.C. and *T. J. Strangman* for Appellants.—The decision of the income-tax authorities that the loans had not been repaid, and that the Hong Kong company continued to be the creditors of the Bombay company was final. The burden of proving that the loans had been repaid and that the Sassoon company had become the creditors of the Bombay company in place of the Hong Kong company was on the Bombay company. The High Court were in error in calling for any reference at all and were further in error in calling for a reference upon a question framed in such manner as to cast the burden aforesaid upon the income-tax authorities. The High Court in their judgment erroneously cast the burden aforesaid upon the income-tax authorities. Even on the assumption that the question, the subject

P.C.

The Commissioner of Income-tax, Bombay *v.* The Bombay Trust Corporation. Ltd.

of the reference, was properly framed the judgment of the High Court was erroneous, there being evidence on which the finding of the income-tax authorities might be sustained.

The Commissioner under S. 66 (5) of the Income-tax Act had already set aside the assessment which was in force at the time of the hearing of the reference. The sum of Rs. 3,17,187-8-0 was the subject of a subsequent assessment. The refund of that sum was not under any law for the time being in force incumbent on the Commissioner. The Bombay company had other specific and adequate remedy under the Income-tax Act to question the assessment under which the sum was payable. The order made was made upon a servant of the Crown merely to enforce satisfaction of a claim on the Crown and was expressly excluded by the Income-tax Act. It was an order made in Original Jurisdiction contrary to S. 106 (2) of the Government of India Act, 5 & 6 George V, Ch. 61. Neither under S. 144 of the Code of Civil Procedure nor under the inherent powers of the Court was the order justified. (Refers to *Jambudas Devidas Chawre* v. *Commissioner of Income-tax, Central Provinces*[1]; *Queen* v. *Special Commissioner of Income-tax*[2]; *E. M. Chettiar Firm* v. *Commissioner of Income-tax, Burma*[3] and *Alcock, Ashdown and Company, Ltd.* v. *The Chief Revenue Authority of Bombay*[4].

[Their Lordships did not want to hear the respondent on the first point but called on the respondent on the second point.]

R. W. Needham and *Reginald Hills* for Respondents.—There was in the year 1927 (being the material "previous year" for the purpose of the said assessments) no business connection within the meaning of S. 43 of the Indian Income-tax Act, 1922, between the Respondent Corporation and the Hong Kong Corporation, nor was there any evidence of such a connection and the Respondent Corporation was not liable to be assessed thereunder as statutory agent for a non-resident person, namely, the Hong Kong Corporation. The Respondent Corporation was not during the year 1927 a borrower of money from the Hong Kong Corporation and did not during that year pay any interest to the Hong Kong Corporation and there was no evidence of any such borrowing or payment and all the evidence was to the contrary. All the evidence being one way, the Assistant Commissioner of Income-tax acted without any evidence and in the teeth of the evidence in holding that the loans from the Hong

1. Shrinivasan's I.T.C., Vol. 3, p. 459.
2. (1894) 3 Tax Cases 289 at 290, 291.
3. Shrinivasan's I.T.C., Vol. 4, pp. 119, 120.
4. (1923) 45 M.L.J. 592: L.R. 50 I.A. 227 at 232: I.L.R. 47 Bom. 742 (P.C.).

P.C.

The Commissioner of Income-tax, Bombay v. The Bombay Trust Corporation, Ltd.

Kong Corporation had not been repaid prior to 1927 and in affirming the assessment made upon the Respondent Corporation for the year 1928-9 which was based upon the assumption that the said loans had not been repaid. The Respondent Corporation was entitled to alter its loan arrangements in any year, and the fact that the Assistant Commissioner of Income-tax took the view that any such alteration may have been due to the consideration that the original loan arrangement with the Hong Kong Corporation had in previous years rendered it liable to be assessed as statutory agent of the latter Corporation under S. 43 of the Income-tax Act, 1922, in respect of the interest upon the loans is wholly irrelevant to affect any question of liability arising in this case.

The Commissioner of Income-tax failed duly to comply with the judgment and order of the High Court dated the 29th August, 1933, as required by S. 66 (5) of the Income-tax Act, 1922. The Commissioner of Income-tax ought not to have referred the matter to the Assistant Commissioner for any further review by him, and the Assistant Commissioner ought not to have directed the income-tax officer to proceed with a view to making a further assessment upon the Respondent Corporation. The action of the Income-tax Officer in making the further assessment upon the Respondent Corporation upon the materials which in the judgment of the High Court had been decided to be insufficient to justify an assessment was contrary to that judgment and to S. 66 (5) of the Income-tax Act, 1922, and was arbitrary and perverse and without jurisdiction. The action of the Income-tax Officer in giving notice requiring the Respondent Corporation to produce the books of the Hong Kong Corporation when he well knew that such books could not be produced in compliance with the notice and in making the further assessment under S. 23 (4) of the Act upon the basis of there having been a default in complying with the notice, was arbitrary and perverse and without jurisdiction.

The Commissioner of Income-tax had been rightly ordered by the High Court under the Specific Relief Act, 1877, to comply with the previous judgment of the High Court, and as a means thereto to repay the tax paid by the Respondent Corporation under the assessment thereby declared valid.

Reginald Hills followed for the respondent and referred to *Commissioners of Income-tax* v. *Pemsel.*[1]

---

1. (1891) A.C. 531 at 568.

P.C.

The Commissioner of Income-tax, Bombay *v.* The Bombay Trust Corporation, Ltd.

Sir George Rankin.

17th July, 1936. Their Lordships' judgment was delivered by

SIR GEORGE RANKIN.—In this case two appeals from the High Court at Bombay have been consolidated. Both appeals are brought by income-tax authorities and both arise out of proceedings to assess a company registered outside British India called the Hong Kong Trust Corporation, Limited (herein referred to as the Hong Kong company) to income-tax in respect of the year of assessment 1928-9. The income-tax authorities have claimed to be entitled to assess the Hong Kong company in the name of the Bombay Trust Corporation, Limited (herein called the Bombay company) as its agent under the provisions of S. 42 (1) and S. 43 of the Indian Income-tax Act, 1922, that is, upon the footing that in the year 1927 profits and gains accrued or arose to the Hong Kong company through its business connection with the Bombay company. The Income-tax Officer having on 29th March, 1930, made an assessment upon this footing the matter came on appeal from him before the Assistant Commissioner. The Assistant Commissioner, on the 12th July, 1930, confirmed the assessment. The Bombay company having requested the Commissioner to make a reference to the High Court under S. 66 of the Act, the Commissioner, on 2nd March, 1931, exercised his powers of review under S. 33, and remanded the appeal for a fresh decision by the Assistant Commissioner after taking certain further evidence. In the end the Assistant Commissioner on the 9th October, 1931, assessed the Bombay company as agent of the Hong Kong company upon a sum of Rs. 20,50,000 which involved a liability to tax, including super-tax, of Rs. 3,17,187-8-0. On the 8th December, 1931, the Bombay company again applied to the Commissioner for a reference of certain questions of law to the High Court. This the Commissioner refused to do, but upon application made to the High Court for an order under S. 66, sub-S. 3 the High Court by order dated 6th October, 1932, required the Commissioner to refer the following question of law:—

"Whether there was any evidence to justify the finding of the Assistant Commissioner that for the year of assessment, profits and gains accrued or arose to the Hong Kong Trust Corporation through its business connection with the Bombay Trust Corporation."

The Bombay company had in the meantime, on the 6th April, 1932, paid under protest Rs. 3,17,187-8-0 the amount of

P.C.
The Commissioner of Income-tax, Bombay *v.* The Bombay Trust Corporation, Ltd.
Sir George Rankin.

the tax assessed. The Commissioner having stated a case for the opinion of the High Court upon the question propounded, and having further stated his opinion that the question should be answered in the affirmative, the High Court on the 29th August, 1933, gave judgment answering the question in the negative, and directing the costs of the reference to be paid to the Bombay company. It is from this decision that appeal No. 1 of 1936 has been brought, and their Lordships will first deal with this appeal.

The main evidence upon the question whether in the year 1927 sums of money were paid by the Bombay company to the Hong Kong company by way of interest upon money lent consists of entries in the books of the Bombay company.

[Their Lordships discuss the correspondence of October and November, 1926, and the declarations made by the Hong Kong Co. and Messrs. E. D. Sassoon & Co. on certain questions formulated by the Assistant Commissioner and the entries in the books and hold that these "books show clearly enough that until November of the year 1926 the Bombay company was borrowing money in large sums from the Hong Kong company at 5¼ % interest upon fixed deposit", "that so long as the Hong Kong company was lending money at interest to the Bombay company the former company was in receipt of profits or gains taxable under Ss. 42 (1) and 43", as held in *Commissioner of Income-tax, Bombay* v. *The Bombay Trust Corporation, Ltd.*[1] and that throughout 1927 entries are made upon the footing that there are no longer any sums received on loan from the Hong Kong company in respect of fixed deposits, call loans or otherwise, but that the Bombay company has received from Messrs. E. D. Sassoon & Company, Ltd., Shanghai (whom their Lordships refer to as the Shanghai branch) a loan in taels on which interest at 5¼ % is being paid.]

The question is whether there was any evidence upon which the income-tax authorities could in law find that in 1927 the Hong Kong company was receiving from the Bombay company any sums as interest on money lent.

In their Lordships' opinion the High Court at Bombay have rightly answered in the negative the question referred to

---

1. (1929) 58 M.L.J. 197: L.R. 57 I.A. 49: I.L.R. 54 Bom. 216 (P.C.).

P.C.

The Commissioner of Income-tax, Bombay *v.* The Bombay Trust Corporation, Ltd.

Sir George Rankin.

them. However sceptical the attitude which the income-tax authorities may think fit to adopt towards the declarations offered and the entries made in the Bombay company's books, it is necessary, if the assessment made is to be supported, that there shall be some evidence to show that in 1927 the loan from the Hong Kong company continued and that interest "accrued or arose" to that company thereon. If the entries in the books show no payment to the Hong Kong company and nothing due to the Hong Kong company, the income-tax authorities cannot without evidence insist upon a right to treat entries showing a tael loan of six and a half crores made by a Shanghai company, and interest calculated in taels paid thereon, as evidence that a somewhat similar amount was due from and was being paid by the Bombay company to the Hong Kong company. The only rule of evidence to be discovered in the Indian Evidence Act having any bearing upon this question would appear to be illustration (*d*) to S. 114 of the Indian Evidence Act:

> "The Court may presume that a thing or state of things which has been shown to be in existence within a period shorter than that within which such things or states of things usually cease to exist is still in existence."

This rule cannot in the present case supply the want of evidence. Their Lordships are not considering a case in which by reason of the entries in an assessee's books of account being inconsistent, or by reason of positive evidence showing that certain entries in his books are erroneous or fraudulent, the value of the books as evidence can be considered as overthrown. On the contrary, though the income-tax authorities have been somewhat slow to appreciate it, the circumstance that in October or November, 1926, it was disclosed that the transactions between the Hong Kong and Bombay companies were to be charged with Indian income-tax means that the persons interested and in control of these closely associated companies had the strongest reasons for desiring to change their course of business (not merely for pretending to change it) so as not in the future to attract the tax. The Hong Kong company from a taxpayer's point of view had two plain disqualifications as a lender; it had a business connection in India and it had a large capital of its own upon which it did not need to pay interest. It is altogether credible therefore that the persons in ultimate control of all the associated companies, should desire to pay off the Hong Kong company and to obtain another financier for

P.C.
The Commissioner of Income-tax, Bombay
v.
The Bombay Trust Corporation, Ltd.
Sir George Rankin.

the Bombay company. By entries regularly made in its books, and by other evidence the Bombay company says that this is what it did. What is the evidence to the contrary—evidence, that is to say, to show that throughout 1927 payments were being made to the Hong Kong company, that what purported to be the making of a tael loan was a fiction, and that entries of payments of interest upon a tael loan were in reality references to payments of interest to the Hong Kong company? Their Lordships agree with the Bombay High Court in thinking that such evidence is altogether lacking. The income-tax authorities in arriving at the contrary opinion have insufficiently considered that the question at issue has to be decided according to the legal rights resulting to the parties from what they in fact did and agreed to. If the Hong Kong company really accepted a credit in the books of the Sassoon company at Shanghai in discharge of their loans to the Bombay company, and if the latter really intended to become liable to Sassoons at Shanghai for a debt in taels then the Bombay company succeeded in changing its financier. The only evidence in the case is evidence to that effect, and a mere refusal to believe in the evidence to that effect is not, in the absence of any positive evidence, sufficient to entitle the income-tax authorities to hold that in 1927 the Hong Kong company was in receipt of profits and gains from the Bombay company.

Comment has been made by different income-tax officials that the Bombay company has not produced the books of the Hong Kong Trust Corporation which are at Hong Kong. Also, and less unreasonably, that the Bombay company was at first unwilling to disclose the name of the firm from which the Sassoon company at Shanghai obtained the finance which enabled them to make the tael loan to the Bombay company. At a later stage of the proceedings the Bombay company, the assessees, stated that Sassoons of Shanghai obtained this finance from a company called Arnold and Company in China. It is said also that Arnold and Company is closely associated with the Sassoon companies. If on these lines it could be shown—not that Arnold and Company lent the money and became entitled as upon a real transaction with Sassoons of Shanghai to the rights of a lender—but that the tael loan made by Sassoons was in fact and in law made by the Hong Kong company, no doubt there would be something upon which the

P.C.

The Commissioner of Income-tax, Bombay *v.* The Bombay Trust Corporation, Ltd.

Sir George Rankin.

assessment order could be supported. But the case stated discloses no evidence to show the falsity of any of the entries in the books or the unreality of the correspondence of October and November, 1926, supported as these are by the declarations for which the Assistant Commissioner had asked. The comments above noted do not supply the place of such evidence. The Bombay company made the repayment in the same manner as it had received payment, namely, by the agency of the common banker. On no view is it possible to suppose that the transactions of 1927 were the same in character as the transactions of the previous years. If it is to be held that very different transactions are in substance the same in character, the basis of such a finding must be evidence. The appeal from the judgment of the High Court dated 29th August, 1933, fails.

It remains to consider the events that followed upon the decision of the High Court. By the terms of S. 66 applicable to the present case, upon receipt of a copy of the judgment it became the duty of the Commissioner to "dispose of the case accordingly". The assessee company contended that the High Court's decision was final in the sense that it put an end to any right on the part of the income-tax authorities to continue the proceedings to assess them as agent for the Hong Kong company for that year of assessment, namely, 1928-9. On this view the duty of the Commissioner would be to set aside the assessment order, to refund the tax which had been paid and to discontinue all further proceedings. The Commissioner took another view. He does not seem to have been furnished with a copy of the High Court's judgment until 14th October, 1933. On the 16th January, 1934, he directed the Assistant Commissioner to take back the appeal on his file, to set aside the assessment and to direct the Income-tax Officer to make a fresh assessment after making such further enquiry as he might think fit. He also directed that the tax paid should be refunded with interest provided that Messrs. E. D. Sassoon and Company, Limited, undertook to be responsible for paying back the amount in case an assessment was levied again or the matter was taken on appeal to the Privy Council. On the 30th January, 1934, the Income-tax Officer acting under S. 22 of the Act required the Bombay company as agent of the Hong Kong company to produce or cause to be produced on the 15th February, 1934, the books of account of the Hong Kong company for the year ended 31st December, 1927. He also

P.C.

The Commissioner of Income-tax, Bombay *v.* The Bombay Trust Corporation, Ltd.

Sir George Rankin.

required the Bombay company as such agent to produce at the same time any evidence on which it might rely in support of its original return. On the 5th February the solicitors for the assessees wrote to the Commissioner claiming that this procedure was unwarranted and asking whether it was proposed to proceed upon the notices issued by the Income-tax Officer pending application for leave to appeal to the Privy Council. On the 15th February the assessees appeared under protest before the Income-tax Officer. On the 20th February the Income-tax Officer purported to make an assessment under sub-S. 4 of S. 23 of the Act because of the failure of the Bombay company to produce the books of the Hong Kong company upon that date. He invited the assessees, however, to make an application under S. 27 to set aside this assessment. At the same time he purported to act under S. 49 (A) of the Act and to set off the amount due upon this fresh assessment against the refund due to the assessees under the order of 16th January, 1934. The application under S. 27 having been made [together with an appeal preferred before the Assistant Commissioner notwithstanding the proviso to sub-S. (1) of S. 30], the assessees were informed on 5th July, 1934, that proceedings in respect of the appeal were postponed until the hearing of the appeal by the Commissioner to His Majesty in Council against the decision of the High Court on the reference. The application under S. 27 was likewise kept in abeyance until the decision of the appeal now before the Board. Thereupon on the 23rd August, 1934, the Bombay company applied by motion to the High Court of Bombay under S. 45 of the Specific Relief Act, 1877, for an order in the following terms:—

"(*a*) That the Commissioner of Income-tax, Bombay Presidency, be ordered to refund and pay back to the Petitioners the sum of Rs. 3,17,187-8-0 being the assessment levied on the Petitioners and being the subject-matter of Civil Reference No. 8 of 1933 under the Indian Income-tax Act referred to in the Affidavit of Mr. A. E. J. Brander and disposed of by this Honourable Court in its appellate side by judgment delivered on the 29th day of August, 1933, with interest on the said sum.

(*b*) That the Assistant Commissioner of Income-tax, Bombay, may be ordered to proceed with and dispose of the appeal filed by the petitioners on the 14th day of March, 1934, against the summary assessment levied by the Income-tax Officer, Companies Circle, Bombay, by his notices dated the 20th day of February, 1934, referred to in the affidavit aforesaid.

(*c*) That the Income-tax Officer, Companies Circle, Bombay, be ordered to proceed with and dispose of the application made by the Petitioners under S. 27 of the Income-tax Act on the 14th day of March, 1934, against the

summary assessment levied by the Income-tax Officer by his notices of assessment dated the 20th day of February, 1934, and referred to in the affidavit aforesaid."

P.C.

The Commissioner of Income-tax, Bombay *v.* The Bombay Trust Corporation, Ltd.

Sir George Rankin.

This application was dealt with by the High Court, Beaumont, C.J. and Rangnekar, J., on the 19th September, 1934. The High Court made an order whereby the Commissioner was directed to set aside the original assessment and to repay to the petitioners the sum of Rs. 3,17,187-8-0 with certain interest and costs. The learned Judges made no order under paragraphs (*b*) and (*c*) of the notice of motion saying that they thought they were unnecessary. It is from this order that appeal No. 85 of 1935 has been brought.

From the judgment of the learned Chief Justice it appears that the Court considered that, as a result of the previous order of the High Court, the proceedings should have been terminated forthwith. They were of opinion that the Commissioner had no jurisdiction to direct the Assistant Commissioner to take back the appeal to him. They also considered that there was no justification for directing the Income-tax Officer to make further enquiry, because the whole assessment was covered by the judgment of the Court, and the Income-tax Officer had already obtained production of all the documents for which he asked. The learned Chief Justice commented with some severity upon that part of the order of the Commissioner which imposed as a condition of refund that a guarantee should be given by E. D. Sassoon and Company: saying that the Commissioner must have known perfectly well that he was not justified in imposing as a condition of the refund that a guarantee should be given by some third party for the amount of any fresh assessment. He further observed with reference to the order under S. 23 (4) made by the Income-tax Officer on the 20th February, 1934, that it was perfectly obvious, and the Income-tax Officer must have known, that it would not be possible for the assessees to produce within fifteen days books of account of the corporation in Hong Kong, a corporation which according to the finding of the Court had no business connection with the assessees. He described the procedure adopted by the income-tax authorities as a flagrant attempt to flout the judgment of the Court and to assess the assessees in a large sum in respect of which the Court had held that there is no evidence to justify the assessment. It being objected that by clause (*g*) of S. 45 of the Specific Relief Act nothing

P.C.

The Commissioner of Income-tax, Bombay *v.* The Bombay Trust Corporation Ltd.

Sir George Rankin.

in that section "shall be deemed to authorise any High Court to make any order on any other servant of the Crown as such merely to enforce the satisfaction of a claim upon the Crown", the learned Chief Justice answered that in the circumstances of this case the order was not being made merely for that purpose, but was being made for the purpose of ensuring that the orders of the Court were not ignored.

The intention of the learned Judges was to make an order requiring that the Commissioner "do forthwith proceed to deal with the case under sub-S. 5 of S. 66 by setting aside the assessment and by repaying to the assessees the amount specified in the application." The formal order was made in the terms "that the first respondent do re-pay to the petitioners the sum of Rs. 3,17,187-8-0 with interest", etc. This part of the order is inartistically expressed: though it is true that in S. 49 (A) the phrase occurs "in lieu of payment of the refund," the duty of the income-tax officials under the Act, and the duty of the Commissioner in the present case under S. 66, sub-S. 5, was to record or cause to be recorded, an order allowing the refund to the assessees and to issue to them a refund order upon which they could obtain payment from a branch of the Treasury or of the Imperial Bank of India. While their Lordships do not say that the distinction between doing these acts and "repaying" is as important for the present purpose as it would have been in an English case (cf. *The Commissioner for Special Purposes of the Income-tax* v. *Pemsel*)[1] it is very necessary that orders made under the Specific Relief Act should specify with exactitude and clarity the specific act which the person holding a public office is being commanded to do. Moreover, their Lordships cannot agree with the view taken by the High Court that the Commissioner was obliged to discontinue proceedings against the Bombay company as agent of the Hong Kong company in respect of the year of assessment 1928-9. It was within the jurisdiction of the Commissioner to direct further enquiry if he thought such enquiry to be reasonable and to be profitable in the public interest. Under S. 33 (2) he has a general power to make enquiry or to cause an enquiry to be made. It was certainly unfortunate that his order for further enquiry took the form of quoting the power given to Assistant Commissioners by

1. (1891) A.C. 531 at 569.

P.C.

The Commissioner of Income-tax, Bombay *v.* The Bombay Trust Corporation, Ltd.

Sir George Rankin.

clause (*b*) of sub-S. 3 of S. 31. That is one of several powers mentioned in the sub-section each of which is to be used in a proper case. As the whole question at issue was whether or not the Hong Kong company, or the Bombay company as its agent, were liable to be assessed at all, to direct the Income-tax Officer to make a fresh assessment after making such further enquiry as he thought fit was an inappropriate form of order. But in substance the Commissioner was within his rights in directing further enquiry, and however disappointing this course may have been to the assessees it is a matter which a Court of law must leave in the discretion of the Commissioner. The learned Judges of the High Court were not justified in thinking that this part of the order of the Commissioner was open to the criticism that the Commissioner was flouting or ignoring the High Court's decision.

Their Lordships cannot but agree, however, with the comments made by the learned Chief Justice upon the Commissioner's order of 16th January, 1934, imposing as a condition of refund that Messrs. E. D. Sassoon and Company, Limited, should undertake to be responsible for paying back the amount in case an assessment were levied again or the matter was taken on appeal to the Privy Council. So, too, in the case of the order of the Income-tax Officer dated the 20th February, 1934, making an assessment in default under S. 23 (4) for failure to comply with the order of 30th January, requiring the Bombay company to produce the Hong Kong company's books of account on the 15th February, the strictures of the High Court are plainly justified. To this their Lordships will add that the action of the Income-tax Officer in refusing to deal with the application under S. 27 until the disposal of the appeal to His Majesty in Council was equally open to criticism. Whether it adds to or subtracts from the discredit of such proceedings, if it be supposed that the income-tax authorities considered themselves entitled to do what was necessary to retain the assessees' money until the decision of this Board could be obtained, is a question upon which no opinion need here be ventured. It should suffice now to observe that since August, 1934, the income-tax authorities have been withholding from the Bombay company over three lacs of rupees extracted from them by an illegal assessment order, and that there is no pretence of justice or law in the notion that the money can be

P.C.

The Commissioner of Income-tax, Bombay *v.* The Bombay Trust Corporation, Ltd.

Sir George Rankin.

withheld in case on some future date a valid assessment may come into existence.

The action taken by the High Court under the Specific Relief Act was, however, incorrect. In the first place the decision of the Court upon the particular question referred to it in this case was given in its special jurisdiction under S. 66 of the Act and was "advisory" (*Tata Iron and Steel Co.* v. *Chief Revenue Authority*)[1] the complaint that the orders of the Court were being ignored does not appear to their Lordships to be a correct statement of the assessees' grievance. But in any case clause (*g*) in S. 45 of the Specific Relief Act does not mean that orders can be made to enforce the satisfaction of a claim upon the Crown provided that the Court acts with some additional motive or has some further intention. The words of the clause have been taken *verbatim* from a well-known judgment on mandamus, the judgment of Coleridge, J., in *Baron de Bode's case*[2]. "But, against the servants of the Crown, as such, and merely to enforce the satisfaction of claims upon the Crown, it is an established rule that a mandamus will not lie. I call this an established rule. I believe it has never been broken in upon." The doctrine is well illustrated by that decision and by the cases therein mentioned, but is even more fully expounded in *Regina* v. *Lords Commissioners of the Treasury*[3]. The principle is that the Court cannot claim even in appearance to command the Crown, and where an obligation is cast upon the principal the Court cannot enforce it against the servant merely as such. Before mandamus can issue to a public servant it must therefore be shown that a duty towards the applicant has been imposed upon the public servant by statute so that he can be charged thereon, and independently of any duty which as servant he may owe to the Crown his principal. Whether the Commissioner of Income-tax, either generally or under S. 66, sub-S. 5 of the Income-tax Act, is in this position as regards the refund of tax paid under an invalid assessment is the question raised by clause (*g*) of S. 45 of the Specifie Relief Act. This their Lordships do not find it necessary in the present case to decide; nor do they discuss the question whether in view of what Lord Phillimore said in *Alcock, Ashdown and*

1. (1923) 45 M.L.J. 295: L.R. 50 I.A. 212: I.L.R. 47 Bom. 724 (P.C.).
2. (1838) 6 Dowling's Reports 776 at 792.
3. (1872) L.R. 7 Q.B. 387.

P.C.

The Commissioner of Income-tax, Bombay *v.* The Bombay Trust Corporation, Ltd.

Sir George Rankin.

Co., Ltd. v. *Chief Revenue Authority of Bombay*[1] the assessees were in any difficulty by reason of S. 106 (2) of the Government of India Act, or had any other specific and adequate legal remedy [*cf.* clause (*d*) of S. 45 of the Specific Relief Act, S. 67 of the Income-tax Act, S. 32 of the Government of India Act]. Before the assessees had brought their application on the 23rd August, 1934, there was in existence the order under S. 49 (A) based upon the fresh assessment of the 20th February. To get rid of that order it was necessary that proceedings should be taken under S. 27, and it was not open to the assessees to apply to the Court direct for an order setting aside that assessment or the set off made thereunder. The assessees' application had contained clauses (*b*) and (*c*) whereby an order was asked directing the Assistant Commissioner to dispose of the appeal and the Income-tax Officer to dispose of the application under S. 27. No order was made by the learned Judges of the High Court in respect of clause (*c*) of the application, and their Lordships do not consider that it was open to the learned Judges of the High Court to direct a refund to be made, or the necessary steps to be taken in that regard, so long as the fresh assessment stood. Their Lordships are, therefore, of opinion that the order of the High Court dated 19th September, 1934, should be set aside and that the parties should pay their own costs of that application. They will humbly advise His Majesty to that effect and that subject thereto this consolidated appeal should be dismissed.

The Commissioner of Income-tax, Bombay Presidency and Aden, must pay to the Bombay Trust Corporation, Limited, two-thirds of their costs in the consolidated appeal.

Solicitors for Appellants: *Solicitor, India Office.*

Solicitors for Respondents: *Linklaters & Paines.*

S. V. V. *P. C. A. No. 85 of 1935 allowed* and

S. P. K. *P. C. A. No. 1 of 1936 dismissed.*

---

1. (1923) 45 M.L.J. 592: L.R. 50 I.A. 227: I.L.R. 47 Bom. 742 (P.C.).

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BURN, MR. JUSTICE KING AND MR. JUSTICE VENKATARAMANA RAO.

Sri Vuppalapati Suryanarayaneswara Jogi Jagannadharaju and another .. *Appellants* in both the appeals (Defendants 2 and 3 in O. S. Nos. 505 and 284 of 1927 respectively, D. M. C. Vizianagaram)*

v.

The Rajah of Vizianagaram represented by the Estate Collector of Vizianagaram representing the Court of Wards—*Vide* Orders dated 7th August, 1936, on C. M. Ps. Nos. 1656 and 1657 of 1936, respectively .. *Respondent in both the appeals (Plaintiff in do.).*

F.B.

Suryanarayaneswara Jogi Jagannadharaju *v.* Rajah of Vizianagaram.

Water and water-courses—Zamindari—Stream rising in Zemindari—Passage through defendant's village—Tributaries feeding the stream—Course of tributaries wholly in defendant's village—Waters flowing in well-defined channels to a stream P *and then into a tank—Tank and stream* P *jointly owned—Obstruction to course of tributaries—If actionable wrong.*

A stream took its rise in a jeroyati village of the plaintiff's zamindari, passed through the defendant's mukhasa village, and while so passing through the village was receiving tributary supplies from four streams, which took their rise entirely within the defendant's village. The waters from the four streams then flowed in well-defined natural channels into a stream *P* and through it into a tank *V* situate in the zamindari. The tank *V* and the stream *P* were owned both by the plaintiff and the defendants. While so in about 1924, more than two years before suit, the defendants intercepted the courses of three of these tributary streams and put up a long bund so as to form a tank and thereby cut off the supply of water which was formerly flowing through these tributaries into *P* and thereby caused loss to the plaintiff's lands.

Held, that the plaintiff is, in the circumstances, entitled to have the water flowing in its accustomed course not only through *P* but also through the tributaries which feed it, and the fact that their course is entirely within the defendant's lands does not affect the question because the defendant is only a riparian owner and as such is entitled to use the water flowing in defined

* S. A. Nos. 1060 and 1061 of 1932. 25th November, 1936.

natural channels as it passes and cannot impound it. Interference with such flow is an actionable wrong.

F.B.

Surya-narayanes-wara Jogi Jagannadha-raju *v.* Rajah of Vizia-nagaram.

Appeal against the decrees of the District Court of Vizagapatam in A. S. Nos. 426 and 442 of 1929 respectively preferred against the decrees of the Court of the District Munsiff of Vizianagaram in O. S. Nos. 505 and 284 of 1927, respectively.

S. Subramania Sastri, P. Somasundaram, Kasturi Seshagiri Rao, S. Ramamurti and *P. Satyanarayana* for Appellants in both.

S. Venkatesa Aiyangar for Respondent in both.

The judgment of the Court was delivered by

Burn, J.

Burn, J.—The defendants are the appellants. The plaintiff, the Rajah of Vizianagaram, filed two suits O. S. No. 284 of 1927 and O. S. No. 505 of 1927, the subject of which was the supply of water to a tank called Vooracheruvu in the village of Kottavalasa in the Vizianagaram zamindari. The facts have been fully stated by the learned District Munsiff and by the learned District Judge. The two suits were tried together by consent of both parties. The zamindar's complaint was that the defendants had interfered with the supply of water to Vooracheruvu which it received through a stream called Pedda Gedda. This stream takes its rise in a jeroyati village of the zamin and passes through the defendants mukhasa village. During its passage through the defendants' village it was receiving tributary supplies from four streams which take their rise entirely within the defendants' village. In or about 1924 the defendants intercepted the courses of three of these streams and put up a long bund so as to form a tank, thereby cutting off the supply of water which was formerly flowing through these tributaries into the Pedda Gedda. In O. S. No. 284 of 1927 the plaintiff prayed for a mandatory injunction to compel the defendants to remove the obstruction to the courses of the natural streams. O. S. No. 505 of 1927 was concerned with the course of the same stream further south. It was alleged by the plaintiff that the course of the stream had been diverted towards the west and that this diversion caused damage to Survey Numbers 17, 18 19 and 20 of Kottavalasa and also to the Malapalli Survey No. 21-B. The plaintiff prayed for a direction in this suit that the defendants might be compelled to close the portion of the channel newly diverted towards the west and to restore it to its original

F.B.

Surya-narayanes-wara Jogi Jagannadha-raju v. Rajah of Vizia-nagaram.

Burn, J.

condition. The learned District Munsiff dismissed both the suits holding that the rights claimed by the plaintiff were rights of easement and that the plaintiff must fail because those rights had been interrupted more than two years before the suits were filed. On appeal the learned District Judge disagreed with the learned District Munsiff on this point of law and granted the plaintiff the mandatory injunction which he sought. His finding with regard to the applicability of S. 15 of the Easements Act has not been challenged before us in appeal.

In S. A. No. 1060 of 1932 Mr. Somasundaram who appears for the appellants concedes that the findings of fact are against him and does not seriously press this appeal. It is found as a fact that the course of the stream was diverted towards the west and that the diversion has caused damage to the plaintiff's lands and in these circumstances it cannot be said that the injunction given by the learned District Judge is in any way wrong.

Mr. Somasundaram has addressed almost the whole of his argument to the question of the blocking up of the tributary streams with which O. S. No. 284 of 1927 was concerned. As to this it is found by both the lower Courts that the tank Vooracheruvu and the stream Pedda Gedda which supplies it belong both to the plaintiff and to the defendants. Mr. Somasundaram has criticised the learned District Judge for describing the plaintiff as a " riparian owner " of the stream. We do not think that much turns upon the adjective ' riparian '. It was definitely admitted by the defendants in their written statements in both the suits that the plaintiff and the defendants were both owners of the tank and of its feeder called Pedda Gedda. It is also found as a fact that the water of the tributaries was flowing in well-defined channels and that these were natural streams. That being so, the plaintiff is entitled to have the water flowing in its accustomed course not only through the Pedda Gedda but also through the tributaries which feed it—Vide *Perumal* v. *Ramaswami Chetti*[1]. Mr. Somasundaram relied upon the fact that these tributaries rise on the defendants' lands and that the course of them is entirely with the defendants' lands. But this does not really improve his position, since according to his own admission he is a riparian owner

1. (1887) I.L.R. 11 Mad. 16.

F.B.

Surya-narayaneswara Jogi Jagannadharaju v. Rajah of Vizianagaram.

Burn, J.

and his rights are limited to those of a riparian owner. The cases which have been quoted by Mr. Somasundaram lay down that a riparian owner is not entitled to impound the water flowing in defined natural channels but is entitled only to use it as it passes. The rights of the defendants, whatever they may be, are subject to the right of the plaintiff to have the water of the Pedda Gedda and its tributaries flow in the customary manner down to him. The learned District Judge is quite right in holding that interference with such flow is an actionable wrong, especially in a case like this where the flow is totally cut off. We think the view of the law taken by the learned District Judge is correct.

The injunction granted by the learned Judge orders that the bund of the tank newly put up by the defendants shall be breached at the points in the Commissioner's plan marked I, II, III and IV in order to allow the water to flow in its usual courses. The plan shows that if breaches are effected in the bund at these points, the object will be achieved. The injunction granted by the learned Judge in O. S. No. 284 of 1927 seems to us therefore to be proper.

In the result, both the appeals are dismissed with costs.

S. V. V. —— *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VARADACHARIAR AND MR. JUSTICE HORWILL.

P. S. Venkatarama Aiyar .. *Appellant** (*Respondent*)

v.

K. P. Sarvothama Rao, Official Liquidator of the South Indian Film Corporation .. *Respondent* (*Applicant*).

Venkatarama Aiyar v. Sarvothama Rao.

Companies Act (VII of 1913), S. 185—Liquidation of company—Claim by liquidator of moneys against former agent—Counter by agent of his right to retain some amounts as well as non-liability for others—Whether S. 185 was applicable—Agent ceasing to be an agent at the time of claim would not preclude Court under S. 185 from taking action—Directions proper to be made.

Where an agent who had ceased his connection with the company of which he was managing agent was asked to pay some amount by the Official Liquidator, as representing monies overdrawn by him from the company while in charge and the agent in his counter claimed that he was entitled to retain some portion of the amount as arrears of salary due to himself, that another portion of the amount claimed had been wrongly debited against him

* O. S. A. No. 35 of 1936. 12th October, 1936.

Venkatarama Aiyar v. Sarvothama Rao.

and that he was further entitled to moneys which might be required to enable him to meet expenses of suits against him as managing agent, and when the claims were disallowed by the first Court he appealed and on appeal by him an objection was taken by the appellant that the case was one which could not have been dealt with under S. 185 of the Companies Act.

Held, (1) that though it is true that S. 185 does not contemplate an elaborate enquiry, discretion must be left to the Court to decide whether any particular claim can or cannot be conveniently dealt with under that section.

In re *Palace Restaurants, Limited,* (1914) 1 Ch. 492 at 500, followed.

(2) That the mere fact of the agent's cessation of functions as a managing agent of the company would not preclude action under S. 185. The test would be whether money claimed by the liquidator had come into his hands in his character of agent or not.

(3) It would be in the best interests of all concerned to direct that accounts be taken in respect of such of the items as the appellant would be entitled to claim either under the terms of S. 217 of the Contract Act or the terms of the particular clause of the agreement and articles of association and the balance alone out of the amount claimed by liquidator be deducted to be paid to him as the amount '*prima facie*' payable to the liquidator in his claim proceedings.

On appeal from the order of the Hon'ble Mr. Justice Lakshmana Rao dated the 2nd day of April 1936 and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in O. P. No. 306 of 1935, Application No. 591 of 1936, in the matter of the Indian Companies Act VII of 1913 and in the matter of the South Indian Film Corporation.

K. Rajah Aiyar and *T. M. Venugopala Mudaliar* for Appellant.

K. Ramanatha Shenoi and *K. P. Sarvothama Rao* for Respondent.

The judgment of the Court was delivered by

Varadachariar, J.

Varadachariar, J.—In the course of the winding up of the South Indian Film Corporation, Limited, the Official Liquidator took out an application under S. 185 of the Indian Companies Act, for a direction to the managing agent Mr. P. S. Venkatarama Aiyar that he should pay up immediately a sum of Rs. 5,400 odd representing the amount overdrawn by him from the company while he was in charge as managing agent. The managing agent by his counter-affidavit claimed (1) that he was entitled to retain a sum of Rs. 2,800 towards arrears of salary due to himself; (2) that he was also entitled to two sums of Rs. 976-0-9 and Rs. 1,083 which were according to him improperly debited against him on the 15th November, 1935; and (3) that he was entitled to retain moneys which might be required to enable him to meet the expenses of certain suits

Venkatarama Aiyar v. Sarvothama Rao.

Varadachariar, J.

filed against him as managing agent. The learned Judge has disallowed these claims and given a direction for payment as asked for by the liquidator. Hence this appeal by the managing agent.

An objection was taken before us on behalf of the appellant that the case is not one that can be dealt with under S. 185 of the Companies Act, as it is not the intention of the Legislature that matters in respect of which there is a contest should be dealt with under that section. Stress was laid upon the use of the words *"prima facie"* in the section and reference was made to certain observations in In re *Palace Restaurants, Limited*[1], and to a concession said to have been made by counsel in *Billimoria* v. *Mrs. DeSouza*[2]. A point was also made of the fact that the appellant has ceased to be the agent of the company from November, 1935; *i.e.,* even before the date of the commencement of the liquidation proceedings. We are not satisfied that these considerations exclude the application of S. 185 to the case (cf. *Haribans Prasad* v. *National Sugar Mills, Ltd.*[3] *(In Liquidation)*. It is true, the section does not contemplate an elaborate enquiry but the discretion must be left to the Court to decide whether any particular claim can or cannot be conveniently dealt under that section. The observation in In re *Palace Restaurants, Limited,*[1] itself lends some support to this conclusion, because the learned Judge in that case actually held that as the counter claimant had submitted to the jurisdiction of the Court it was not open to him to take exception to the proceedings at a later stage. In the same way, we may point out in this case also, the appellant did not take exception to the maintainability of the application under S. 185 in the lower Court, but was only anxious, and we dare say rightly anxious, that his claims to credit under various heads should be considered. We do not also think that the mere fact of his having ceased to be an agent before the commencement of the liquidation proceedings excludes action under S. 185. It seems to us the test is whether the money now claimed came into his hands in his character as agent or not. It is not denied in the present case that the money did so come into his hands.

1. (1914) 1 Ch. 492 at 500. 2. (1926) I.L.R. 8 Lah. 549 at 551.
3. (1932) I.L.R. 14 Lah. 68.

Venkatarama Aiyar *v.* Sarvothama Rao.

Varadachariar, J.

Proceeding now to the items of credit claimed by the appellant, the claim for Rs. 2,800 under the head of arrears of salary has in our opinion been rightly disallowed by the learned Judge and the same has not been seriously pressed before us. The second head of claim, *viz.*, that relating to the two sums of Rs. 976-0-9 and Rs. 1,083 seems to us to be equally untenable. It has not been disputed that at a meeting of the Directors held on 9—4—1935, these items were disallowed after discussion and the resolutions recorded on that date give the reasons for the disallowance. The argument advanced by the appellant's counsel in this connection is that a sum inclusive of these two items had been shown in the report presented to the statutory meeting on that day and that therefore under S. 77 (cl. 8) of the Companies Act it acquires a finality which cannot be affected except by proceeding in accordance with the formalities prescribed in the section. We do not see any force in this contention. The question of items to be allowed or disallowed as between the company and its agent is certainly within the powers of the Directors. What appears from the representation made before us is that in the report printed but that in due course when the matter came up before the Directors these two items were disallowed. We do not see that the mere accident of the original figures appearing in the report placed before the meeting of the shareholders prevented the Directors from considering the propriety or otherwise of the various items of credit claimed by the Managing agent. So far as one can gather from the resolutions themselves, it is clear that the appellant also was present at that meeting of the Directors and there is nothing on record to show that he took exception to the disallowance. The mere fact that these items of disallowance were actually brought into the account only later on in November, *i.e.*, after the appellant's resignation, does not warrant the suggestion that they have been fraudulently debited against the appellant. Once the disallowance was authorised by a formal resolution of the Directors, it was merely a question of account keeping as to when the items are actually carried into the accounts. We are therefore of opinion that the learned Judge's decision disallowing these items is also correct.

The third head however has to be considered in some detail. From the learned Judge's judgment, it would appear

Venkatarama Aiyar v. Sarvothama Rao.

Varadachariar, J.

as if the claim was pressed before him *en bloc* without splitting it up into the various sub-heads comprised in it. If all that the learned Judge meant was that the agent was not entitled to retain moneys in his hands merely to meet prospective claims against him he was of course perfectly right, if we may say so; but both under S. 217 of the Contract Act and under cl. 10 of the agreement between the Managing Agent and the Company, the agent has got a right of retainer in respect of various charges and expenses and under cl. 191 of the Articles of Association he is given a lien over the property of the company for certain claims. Of the suits referred to in the 4th paragraph of the appellant's counter-affidavit, it is stated that two are suits filed against the Directors for alleged fraud in the matter of the issue of the prospectus. If this is so, it would be very doubtful if any of the items of expenditure incurred by any of the directors or by the appellant as one of them in connection with such a suit will come within the right of indemnity or retainer which the appellant will be entitled to as against the company either under the law or any of the terms of his agreement. More than that we do not wish to say at this stage. The third suit is said to be one filed by the Kodak's Limited against the appellant in respect of goods purchased by him for the company on his own personal guarantee. As the facts relating to this suit are not before us we do not wish to say more in respect of the appellant's claim even under this head except to say that if a claim like that made by the liquidator against the appellant can be dealt with under S. 185 of the Companies Act, it is only fair that the claims which the appellant may have against the company must also be considered at the same time and it will not be proper to drive the appellant to a separate suit in respect of claims that he may have against the company.

It is represented that the decree in the suit brought by the Kodak's Limited was passed only subsequent to the date of the application to the lower Court. We do not think we will be justified in dealing with an application of this kind as if it were an ejectment suit and seek to ascertain the rights of the parties only as on the date of the initiation of the proceedings. It will probably be in the best interests of all concerned to direct that accounts be taken up to 1st November, 1936, in respect of such of the items as the appellant will be entitled to retain either under the terms of S. 217 of the Contract Act or

Venkatarama Aiyar v. Sarvothama Rao.

Varadachariar, J.

the terms of cl. 10 of the Agreement and Art. 191 of the Articles of Association and the balance alone out of the amount claimed by the liquidator be directed to be paid to him as the amount *"prima facie"* payable by the appellant to the liquidator in these proceedings.

As the appellant has failed in part and has succeeded in part so far as this appeal is concerned, we do not make any other order as to costs in this appeal except that the Official Liquidator will be entitled to take his costs of this appeal out of the estate.

K. C. —— *Appeal allowed in part.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VARADACHARIAR.

Subbaratnam Chettiar .. *Appellant** *(Plaintiff)*

v.

Gunavanthalal Vidyasankar by agent Narendralal-Gunavanthalal .. *Respondent (Defendant).*

Subbaratnam Chettiar v. Gunavanthalal Vidyasankar.

Minor—Guardian ad litem *representing in a small cause suit—Promissory note executed by minor's undivided uncle in the course of trade—Trade not ancestral—Liability of minor—How far binding on family properties in his hands—Question of gross negligence raised—Omission to take proper pleas affecting minor—Liability of minor how far sustainable—Omission to take a plea as well as any absurd plea amounting to gross negligence.*

In a suit by the plaintiff for a declaration that a decree on a promissory note obtained against him in a previous suit of a small cause nature on the ground that the deceased maker of the note was his undivided uncle, and as his legal representative he (the minor) was liable for the debt so long joint family properties were in his hands, he alleged that the decree was not binding upon him or on the family properties in his hands on account of (1) that he was not properly represented by a guardian in that suit, and (2) that his guardian, if held to have been properly appointed, had been guilty of gross negligence. The first ground being a question of fact on which the lower Court had come to a conclusion it was not possible in second appeal to interfere with the decision that the guardian was properly appointed, but on the other question whether there was gross negligence,

Held, (1) that though on this question the second appellate court was bound by the facts arrived at, still it was open for this Court to consider whether on those facts, what would amount in law to negligence had been made out or not;

(2) that a minor could have a decree against him set aside not only on the ground of fraud but also on the ground of gross negligence.

Chanduru Punnayyah v. *Rajam Viranna,* (1921) 42 M.L.J. 429: I.L.R. 45 Mad. 425; *Vadapilli Jogarao* v. *Kala Venkamma,* A.I.R. 1927 Mad. 497;

* S.A. No. 887 of 1932. 28th October, 1936.

Subba-ratnam Chettiar *v.* Gunavantha-lal Vidya-sankar.

Ayya Pillai v. *Ayyadurai Goundan,* (1934) 67 M.L.J. 927 and *Gotepati Subban* v. *Gotepati Narasamma,* (1914) 27 M.L.J. 486, referred to and relied on.

Raghubar Dyal Sahu v. *Bhikya Lal Misser,* (1885) I.L.R. 12 Cal. 69, dissented from.

(3) that an objection could have been taken on behalf of the minor defendant in the small cause suit to his being impleaded as a legal representative in that suit on the death of his undivided uncle.

It is permissible for the creditor to include in one and the same suit not merely claim against the maker of the promissory note but also against the other members of the joint family in respect of the debt represented by the note. But there can be little doubt that such a suit really combines two causes of action and two kinds of liability, namely, that of the maker under the note, and that of the other members under the Hindu Law. There can be no doubt that on the death of a maker, cause of action on the note would have served only against his legal representative in the strict sense, that is, his heirs at law and not against the surviving members of the joint family other than sons. In the case of sons the special provision enacted in S. 53, Civil Procedure Code, may introduce a difference. But in the case of the other members of the joint family the mere fact that they may be equally liable with the maker for the debt will not make them legal representatives of the maker. That they cannot be legal representatives so far as the joint family property in their hands is concerned has been recognised in several cases. [See *Veerappa Chettiar* v. *Ramaswami Aiyar,* (1903) I.L.R. 27 Mad. 106; *Sumeshar Bind* v. *Baldeo Sahu,* (1934) 33 A.L.J. 293 and *Dwarka Das* v. *Krishan Kishore,* (1921) I.L.R. 2 Lah. 114 at 117, 118.] Cases in this Court have also held that a decree obtained against a member of a joint Hindu family even if it be for a debt binding on the family cannot be executed against the shares of the other members of the family unless they be sons of the judgment-debtor (cf. *Viraragavamma* v. *Samudrala,* (1885) I.L.R. 8 Mad. 208; *Guruvappa* v. *Thimma,* (1887) I.L.R. 10 Mad. 316; *Sathuvayyan* v. *Muthusami,* (1888) I.L.R. 12 Mad. 325 and *Lakshmana Chettiar* v. *Muthu Chellia Goundan,* (1934) 68 M.L.J. 104.

(4) that an issue as to the binding character of the promissory note on the family should not have been permitted to be raised and dealt with at all.

Cases which relate to immovable property possessed by a joint Hindu family in respect of which a member is sued or sues in a representative capacity and cases in which a manager may sue on debts due to the family stand on a different footing and bear no analogy to the question here.

(5) Since the concurrent findings below made the trade, in the course of which the debt had been contracted by the uncle, not ancestral but one started by the uncle himself, the plaintiff was on a stronger ground to raise the plea of the gross negligence in omitting to take exception, in the previous suit, to the trial of the question of the liability of the family property in his hands.

(6) That the omission to put forward a correct defence equally with the putting forward of an absurd defence would constitute gross negligence on the part of a guardian *ad litem.*

Gotepati Subban v. *Gotepati Narasamma,* (1914) 27 M L.J. 486, followed.

Appeal against the decree of the District Court of Trichinopoly in Appeal Suit No. 333 of 1931, preferred against the decree of the Court of the District Munsiff of Trichinopoly in Original Suit No. 278 of 1930.

Subbaratnam Chettiar v. Gunavanthalal Vidyasankar.

T. V. Muthukrishna Aiyar, for Appellant.

T. R. Srinivasa Aiyar for *Watrap S. Subramania Aiyar* for Respondent.

The Court delivered the following

JUDGMENT.—This second appeal arises out of a suit brought by the plaintiff for a declaration that the decree in small cause suit No. 2888 of 1924 on the file of the Small Cause Court, Trichinopoly, is not binding on the plaintiff or the family properties in his hands. The small causes suit was instituted on a promissory note executed by the plaintiff's undivided uncle, one Muthukrishna Chettiar, who died pending that suit. On his death the plaintiff who was then a minor was impleaded as the second defendant and all that appears at present is that he was represented by a Court guardian. The decree and the judgment show that the Court guardian engaged a vakil for the minor plaintiff and it was pleaded on his behalf that the deceased first defendant was not the managing member of the family and that the debt was incurred by him for immoral purposes. An issue was raised whether the suit promissory note was binding on the family. The small cause Judge held that the plaintiff in that suit was entitled to a decree not merely against the assets of the deceased first defendant but also against the family properties of both the defendants, because the promissory note had been executed by the first defendant when he was in management of the family affairs for a debt which was found due on dealings. He added:

"The first defendant was a ruby merchant and the dealings related to the purchase of rubies. The defendants are a Chetti family which may be presumed to be a trading family. The first defendant was a trader in rubies".

In the present suit, the plaintiff alleged that the decree was not binding upon him and the family properties in his hands, on two grounds (*i*) that he was not properly represented in the small cause suit, and (*ii*) that his guardian *ad litem* had been guilty of gross negligence. The objection as to proper representation rests on the circumstance that the plaintiff had been represented by a Court guardian when his mother was alive. The learned District Judge rightly points out that at this time of the day when the records of the small cause suit had been destroyed, it is not possible to hold that the plaintiff in the small cause suit must have been guilty of fraud in the matter of getting the minor represented by a Court guardian.

Subba-ratnam Chettiar v. Gunavanthalal Vidya-sankar.

It is scarcely likely that any Court would in the first instance have appointed a Court guardian. Some steps must have been taken to have somebody else appointed guardian and it is only on failure of these steps that a Court guardian is likely to have been thought of. I am not therefore prepared to interfere with the lower Court's conclusion so far as the first ground is concerned.

As regards the second ground, the fact, as now concurrently found by both the Courts, is that the ruby trade in connection with which the uncle executed the promissory note to the plaintiff in the small cause suit was not an ancestral trade but one started by the uncle himself. Both the Courts have also held that on these facts the minor nephew could not have been legally held liable for that debt of the uncle, nor the family property which had come into his hands, by survivorship. On these findings, the District Munsiff gave a decree in the plaintiff's favour, but the learned District Judge set it aside with the following observations:

> "It has not however been shown that the omission to take this line of defence was due to any culpable negligence on the part of the Court guardian. There is no evidence at all as to what he did and what particular step he took. . . . The pleader who appeared for plaintiff has also not been examined to show from whom and in what circumstances he derived his instructions. In the absence of any positive evidence from him or from plaintiff's mother, ... I consider that this appeal should be allowed".

On behalf of the respondent, Mr. T. R. Srinivasa Aiyar contends that this is a finding of fact which I am not entitled to interfere with; I cannot accede to that contention. I am bound by the facts stated by the learned Judge but the question whether on these facts what will amount in law to negligence has been made out or not is one which it is open to this Court in second appeal to consider. I may also dispose of another contention of Mr. Srinivasa Aiyar, *viz.*, that as a matter of law a minor can have a decree against him set aside only on the ground of fraud and not on the ground of gross negligence on the part of the guardian. There is no doubt something in support of this contention in *Raghubar Dyal Sahu* v. *Bhikya Lal Misser*[1], but all the later authorities are against it. It is sufficient to refer to *Punnayyah* v. *Viranna*[2], *Jogarao* v.

1. (1885) I.L.R. 12 Cal. 69.
2. (1921) 42 M.L.J. 429: I.L.R. 45 Mad. 425.

Subbaratnam Chettiar *v.* Gunavanthalal Vidyasankar.

Venkammal[1], *Ayya Pillai* v. *Ayyadurai Goundan*[2] and *Gotepati Subban* v. *Gotepati Narasamma*[3]. The passing reference in *Sellappa Goundan* v. *Masa Naiken*[4], to the decision in *Raghubar Dyal Sahu* v. *Bhikya Lal Misser*[5], certainly does not imply dissent from the considered judgment in *Punnayyah* v. *Viranna*[6]. The decision in *Raj Gopal Acharjya* v. *Upendra Acharjya Goswami*[7], turned on the express language of S. 258 of the Chota Nagpur Tenancy Act. That on general principles the Patna High Court has taken the same view as the Madras Court will be seen from the observations of that Court in *Kali Charan* v. *Hirdai Narain*[8].

Before dealing with the particular ground dealt with in the Courts below, I may state that there is one other point which also seems to me to be of some importance in the case, namely, whether the plea of the liability of the family property in the hands of the minor defendant should have been allowed to be raised in the small cause suit at all. As stated already, that suit was on a promissory note executed by the minor's paternal uncle and he was the only defendant in the first instance. It is true that a line of authority in this Court beginning from *Krishna Aiyar* v. *Krishnasami Aiyar*[9], makes it permissible for the creditor to include in one and the same suit not merely the claim against the maker of the promissory note but also the claim against the other members of the joint family in respect of the debt represented by the note. But there can be little doubt that such a suit really combines two causes of action and two kinds of liability, namely, that of the maker under the note, and that of the other members under the Hindu Law. The authorities bearing upon this question have been considered at some length in a recent judgment in Appeal Suit No. 89 of 1931 to which I was a party and it is unnecessary to re-capitulate them here. There can be no doubt that on the death of the maker the cause of action *on the note* would have survived only against his legal representative in the strict sense, *i.e.*, his heir-at-law and not against the surviving

1. A.I.R. 1927 Mad. 497.
2. (1934) 67 M.L.J. 927.
3. (1914) 27 M.L.J. 486.
4. (1923) 45 M.L.J. 675: I.L.R. 47 Mad. 79 at 83.
5. (1885) I.L.R. 12 Cal. 69.
6. (1921) 42 M.L.J. 429: I.L.R. 45 Mad. 425.
7. (1926) I.L.R. 5 Pat. 768.
8. A.I.R. 1935 Pat. 24 at 28, 29.
9. (1900) I.L.R. 23 Mad. 597.

Subbaratnam Chettiar *v.* Gunavanthalal Vidyasankar.

members of the joint Hindu family other than sons. In the case of sons the special provision enacted in S. 53, Civil Procedure Code, may introduce a difference. But in the case of the other members of the joint family the mere fact that they may be equally liable with the maker for the debt will not make them legal representatives of the maker. That they cannot be legal representatives so far as the joint family property in their hands is concerned has been recognised in several cases. It is sufficient to refer to *Veerappa Chettiar* v. *Ramaswami Aiyar*[1], *Gyanendra Nath Basu* v. *Rani Nihalo Bibi*[2], *Sumeshar Bind* v. *Baldeo Sahu*[3] and *Dwarka Das* v. *Krishan Kishore*[4]. Cases in this Court have also held that a decree obtained against a member of a joint Hindu family even if it be for a debt binding on the family cannot be executed against the shares of other members of the family unless they be sons of the judgment-debtor. (Cf. *Viraragavamma* v. *Samudrala*[5], *Guruvappa* v. *Thimma*[6] and *Sathuvayyan* v. *Muthusami*[7] and *Lakshmana Chettiar* v. *Muthu Chellia Goundan*).[8] In a recent case *Seshayya* v. *Sanjivarayudu*[9], it was held by Cornish, J., that in a suit on a promissory note executed by a member of a joint Hindu family the surviving members of the joint family cannot be impleaded as legal representatives. There has been some difference of opinion between a case in this Court, *Rengathammal* v. *Venkatachariar*[10] and the decision of the Allahabad High Court in *Sumeshar Bind* v. *Baldeo Sahu*[3], as to whether the possession of separate property by the deceased member of the joint Hindu family and the devolution thereof on a surviving member of a joint Hindu family should be proved in the first instance even before the surviving member could be impleaded as a legal representative. But even in the Allahabad case, the Court recognized that after impleading the survivor as a legal representative, a decree could be passed only against the assets of the deceased and not as against the joint family property. In the light of these considerations I am of opinion that an objection could have been taken on behalf of the minor defendant to his being impleaded as a legal representative in the

1. (1903) I.L.R. 27 Mad. 106.
2. (1910) I.L.R. 32 All. 404.
3. (1934) 33 A.L.J. 293.
4. (1921) I.L.R. 2 Lah. 114 at 117, 118.
5. (1885) I.L.R. 8 Mad. 208.
6. (1887) I.L.R. 10 Mad. 316.
7. (1888) I.L.R. 12 Mad. 325.
8. (1934) 68 M.L.J. 104.
9. (1933) 67 M.L.J. 393.
10. A.I.R. 1930 Mad. 575.

Subbaratnam Chettiar v. Gunavanthalal Vidyasankar.

small cause suit on the death of his undivided uncle. When he was so added he could have raised only such defences as were appropriate to his character as legal representative. An issue as to the binding character of the note on the family should not have been permitted to be raised and dealt with at all. Cases which relate to the immovable property possessed by a joint Hindu family in respect of which a member of the family sues or is sued in a representative character and cases in which the managing member of a family may sue on debts due to the family stand on a different footing altogether and do not bear any analogy to the present case.

Assuming, however, that the omission to take exception in the small cause suit to the trial of the question of the liability of the family property would not of itself amount to gross negligence on the part of the guardian *ad litem*, because the question must at least have been tried in a separate suit, the minor has a stronger ground on the merits in the present case. As I have stated already, both the Courts have concurrently found that the trade in the course of which the debt was incurred by the uncle was not an ancestral trade but one started by the uncle. If this fact had been pleaded, a decree could not have been passed as against the joint family property in the hands of the minor. I do not see how the omission to examine the plaintiff's mother or the vakil who appeared for him in the former litigation bears upon this question. I am prepared to assume for the purpose of argument that the mother herself was the guardian *ad litem* of the minor. The respondent could not put his case on a higher footing. It will then follow either that she was not aware of the law or that she was not aware of the material facts. In either view, the omission to raise the plea will amount to gross negligence. I am not for a moment asserting that untenable or unfounded defences should have been put forward but the investigation of the facts in the present case has shown that this defence was clearly available. On the other hand, the only defence thought of on the former occasion was the stock defence of illegality and immorality which no attempt was made to substantiate. As held in *Gotepati Subban* v. *Gotepati Narasamma*[1], the omission to put forward the correct defence equally with the putting forward of an absurd defence will constitute gross negligence

1. (1914) 27 M.L.J. 486.

on the part of the guardian *ad litem*. The second appeal must therefore be allowed and the decree of the trial Court restored with costs here and in the Court below.

Subbaratnam Chettiar *v.* Gunavanthalal Vidyasankar.

Application is made to me for leave to file a Letters Patent Appeal. I should gladly have granted the leave if the interests involved were large enough to justify it. The amount of the small cause decree is only about Rs. 367 and subsequent interest. I do not think it justifies the further prolongation of this litigation. I decline to grant leave.

K.C. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Muthusami Servai and another .. *Petitioners* (Defendants 2 and 3)*

v.

N. K. Mytheen Pichai Rowther and another .. *Respondents (Plaintiff and 1st Defendant).*

Muthusami Servai *v.* Mytheen Pichai Rowther.

Hindu Law—Lottery run by father—Subscriptions collected by father—Death of father—Suit by subscriber after his death against the sons—If sons liable to pay out of the joint family property.

Where a Hindu father conducted a lottery which was an illegal one, the father is liable to the subscribers to refund the subscriptions collected by him, but in a suit brought against the sons after his death, the sons are not liable to pay the same even out of the joint family property that has come into their hands.

Sesha Aiyar v. *Krishna Aiyar,* (1935) 70 M.L.J. 36: I.L.R. 59 Mad. 562 (F.B.), distinguished.

Petition under S. 25 of Act IX of 1887 praying the High Court to revise the decree of the Court of the District Munsiff of Sivaganga dated the 20th day of January, 1936 and made in S. C. S. No. 729 of 1935.

S. V. Venugopalachari for Petitioners.

Respondents unrepresented.

The Court delivered the following

JUDGMENT.—The first defendant and the father of defendants 2 and 3 received subscriptions from the plaintiff for the conducting of a lottery, presumably advertised and conducted in the usual way. There can be no doubt, after *Sesha Aiyar* v. *Krishna Aiyar*[1] that the father of defendants 2 and 3 would

---

* C. R. P. No. 303 of 1936. 27th November, 1936.

1. (1935) 70 M.L.J. 36: I.L.R. 59 Mad. 562 (F.B.).

Muthusami Servai v. Mytheen Pichai Rowther.

have been liable to refund to the plaintiff his subscriptions. The only question that arises in this petition is whether the defendants 2 and 3 are liable for this sum out of the joint family property that has come into their hands. The District Munsiff of Sivaganga has held that they are. Hence this Civil Revision Petition by defendants 2 and 3.

The argument of the learned District Munsiff is in brief that the plaintiff's claim has no reference to an illegal contract and that as the father of defendants 2 and 3 was under a civil liability to return the money to the plaintiff, defendants 2 and 3 are also liable for that debt. It seems to me that both these statements of law are wrong. The contract between the plaintiff and the father of defendants 2 and 3 was an illegal one and it was in pursuance of that illegal contract that the father of defendants 2 and 3 came into possession of the money. It is true that the return of the money would not be in furtherance of the illegal contract; but that is not the point. The criterion is whether the money was taken for an illegal purpose. Clearly it was.

Ordinarily, a person who has paid money for the furthering of an illegal object cannot recover that money in a Civil Court; but an exception is made where a contract has been made illegal for the protection of a certain class of persons. In such a case a member of that class is considered not to be in *pari delicto* with the organiser of the illegal organisation and on that ground is allowed to sue. A subscriber to a kuri has not however that advantage as against the sons of a stake-holder. On the contrary, the subscriber is a party to an illegal contract while the sons of a stake-holder are innocent persons. Even on this ground therefore the plaintiff would have to fail.

Some support to the learned District Munsiff's finding that the test of the son's liability is whether the father would be civilly liable for the debt is given by *Venugopal Naidu* v. *Ramanadhan Chetty*[1]. It is clearly wrong however. Supposing the father commits theft, he would undoubtedly be liable in a Civil Court for the stolen goods; but the sons would not be liable because the property was received illegally and the debt incurred was an illegal one. The passages in *Venugopal Naidu* v. *Ramanadhan Chetty*[1] which give rise to this too broad statement of the law are expressly disapproved of in another

1. (1912) 23 M.L.J. 61: I.L.R. 37 Mad. 458.

case quoted by the learned District Munsif, *Garuda Sanyasayya* v. *Nerella Murthenna*[1]. The other cases cited in the lower Court lend no support to the argument approved by the learned District Munsif. Both in *Venugopala Naidu* v. *Ramanadhan Chetty*[2] and *Venkatakrishnayya* v. *Byragi*[3], sons were held liable for such sums as their fathers had received as trustees and not properly accounted for. The two principles to be applied to test the liability of the sons are correctly set out by Venkatasubba Rao, J., in *Muthammal* v. *Sivakami Ammal*[4]. They are:—

"(1) If the debt is in its inception not immoral subsequent dishonesty of the father does not exempt the son.

(2) It is not every impropriety or every lapse from right conduct that stamps the debt as immoral. The son can claim immunity only, when the father's conduct is utterly repugnant to good morals, or is grossly unjust, or flagrantly dishonest."

Defendants 2 and 3 are not therefore liable for their father's debt to the plaintiff from out of the joint family property that came into their hands upon their father's death. This petition is therefore allowed and the decree of the lower Court modified. Under the circumstances there will be no order as to costs in this Court. In the trial Court the 2nd and 3rd defendants will bear their own costs; but will not be liable for the costs of the plaintiff.

K. C. ——— *Petition allowed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR HORACE OWEN COMPTON BEASLEY, *Kt.*, *Chief Justice*, SIR V. RAMESAM AND MR. JUSTICE KING.

S. M. Narayana Aiyangar ... *Appellant* in all the Second Appeals (Defendant)*

v.

S. P. R. M. Subramanian Chettiar and others .. *Respondents in all (Plaintiffs).*

Madras Estates Land Act (I of 1908), S. 3 (4) (f)—Fruit garden—Cocoanut plantation on dry land—Liability of tenant for additional rent—Civil Procedure Code (V of 1908), S. 11—Landlord and tenant—Suit for rent—Decision regarding nature of holding—Effect in suit relating to subsequent

1. (1918) 35 M.L.J. 661.
2. (1912) 23 M.L.J. 61 : I.L.R. 37 Mad. 458.
3. (1925) 50 M.L.J. 353.
4. (1925) 21 L.W. 606.

* S.A. Nos. 1148 to 1151 and 1181 of 1932. 8th February, 1935.

F.B.

Narayana Aiyangar v. Subramanian Chettiar.

years—Erroneous decision of question of law—Whether operates as res judicata.

Cocoanuts are fruits, cocoanut trees are fruit trees, and a cocoanut plantation is a fruit garden and an improvement within the meaning of S. 3 (4) (*f*) of the Madras Estates Land Act. Consequently a tenant who has planted a cocoanut garden on dry land cannot be made liable for any additional rent beyond the dry rate.

Sri Raja Bommadevara Chayadevamma v. *Venkataswamy*, (1931) 62 M.L.J. 511, approved.

Vellayappa Chetti v. *Subramaniam Chettiar*, (1926) 51 M.L.J. 880: I.L.R. 50 Mad. 482 disapproved.

Where in a suit for rent relating to certain faslis the tenant pleaded that he was not liable for any increased rent as the holding comprised a cocoanut garden and was the subject of an improvement within the meaning of S. 3 (4) (*f*) of the Madras Estates Land Act, but the Court rejected the contention on the ground that a cocoanut garden was not a fruit garden and was not therefore an improvement, and in a later suit between the same parties for recovery of rent in respect of subsequent faslis the same plea was raised by the defendant.

Held, that the decision on the question of law in the prior suit as to whether a cocoanut garden was a fruit garden and therefore an improvement within the meaning of the Act operated as *res judicata* between the parties in the later suit, notwithstanding the fact that that view of the law had subsequently been declared to be erroneous in later decisions of the Court.

Held, however, that the principle of *res judicata* on a question of law should be confined to matters which actually existed at the time of the former decision, and therefore areas and trees to which it was not applied then would be governed by the correct principle of law.

Case-law reviewed.

Appeal against the decree of the District Court of Ramnad at Madura in A. S. Nos. 501 to 504 of 1929 and 350 of 1921, preferred against the decree of the Court of the Special Deputy Collector of Manamadura in S. S. Nos. 2626 and 2627 of 1923, 3860 and 3861 of 1926 and 1579 of 1920, respectively.

The appeal came up in the first instance before Varadachariar, J., who made the following

Order of reference to a Full Bench.

This batch of second appeals arises out of suits for rent in respect of two sets of holdings covered by Patta Nos. 38 and 54. Two of the second appeals arise out of suits of 1923 and two more out of suits of 1926 and the fifth arises out of a suit instituted in 1920 and is the result of an intermediate remand by this Court.

One of the main questions in these cases turns on the effect of the definition of 'improvements' in S. 3, cl. 4 of the Estates Land Act, the point for decision being whether a cocoanut plantation comes within that definition or not. One Bench of this Court in a suit between these very parties—reported in *Vellayappa Chetti* v. *Subramaniam Chettiar*[1], held that it does not. Another Bench in

1. (1926) 51 M.L.J. 880: I.L.R. 50 Mad. 482.

F.B.

Narayana Aiyangar *v.* Subramanian Chettiar.

a case reported in *Sri Raja Bommadevara Chayadevamma* v. *Venkataswamy*[1], has dissented from that decision and held that it is an 'improvement'. It is by reason of the decision in *Vellayappa Chetti* v. *Subramaniam Chettiar*[2], that the lower Courts have held that the matter is *res judicata* between the parties even though the present suits relate to subsequent faslis.

One of Mr. Rajah Aiyar's contentions on behalf of the appellant is that the point being merely one of law, turning on the definition in the Act, the rule of *res judicata* should not be applied and he next contends that it cannot be applied to some at least of these suits, where even according to the present plaints the claim is not on the same basis as in the old suits but on a different basis by reason of changed facts. He also contends that in the application of the rule of *res judicata,* the present case is governed by the analogy of the decision in *Broken Hill Proprietary Co., Ltd.* v. *Broken Hill Municipal Council*[3], and not of that in *Badar Bee* v. *Habib Merican Noordin*[4]. With reference to the decision in *Maharajah of Jeypore* v. *Ramamurthy*[5], he takes exception to some observations in that judgment and relies on certain other portions of that judgment and he further contends that the decision in *Tarini Charan Battacharya* v. *Kedar Nath Haldar*[6] is if anything in his favour, rather than against him.

I must say that the question of *res judicata* is by no means free from difficulty and the decisions on the point are by no means uniform. It has to be remembered that the policy of S. 13 of the Estates Land Act was a statutory declaration that even if a practice had theretofore existed of paying for improvements effected by the tenant, it should no longer be capable of being enforced. It will be a matter for consideration how far that policy can be controlled by the application of the rule of *res judicata,* merely on the ground that in a litigation relating to prior faslis, the Court has interpreted S. 3, cl. 4 of the Estates Land Act in a particular manner. I am not as at present advised quite satisfied that the decision is one on a mixed question of law and fact. I do not say more on that matter, as I am suggesting that the case may be placed before his Lordship the Chief Justice for his consideration whether it may be posted before a Bench of two judges or before a Full Bench, to deal with the question of *res judicata* on the point of law and also to consider the conflict between the judgments in *Vellayappa Chetti* v. *Subramaniam Chettiar*[2] and *Sri Raja Bommadevara Chayadevamma* v. *Venkataswamy*[1].

1. (1932) 62 M.L.J. 511.
2. (1926) 51 M.L.J. 880: I.L.R. 50 Mad. 482.
3. (1926) A.C. 94.
4. (1909) A.C. 615.
5. (1933) 65 M.L.J. 684.
6. (1928) I.L.R. 56 Cal. 723 (F.B.).

F.B.

Narayana Aiyangar *v.* Subramanian Chettiar.

On hearing the case opened by Mr. Rajah Aiyar, I felt that even if I should uphold the plea of *res judicata*, to some extent, it might still become necessary to deal with the conflict between *Vellayappa Chetti* v. *Subramaniam Chettiar*[1] and *Sri Raja Bommadevara Chayadevamma* v. *Venkataswamy*[2], and that if I should accept his contention that it is not *res judicata* this conflict will necessarily have to be considered. As will appear from the judgments in those two cases, the practice of rearing cocoanut and palm trees in extensive areas of land classified as 'dry' is quite common in the southern districts and it seems to me desirable that there should be an authoritative pronouncement as to whether such plantations are or are not 'improvements' within the meaning of the definition in the Estates Land Act.

The matter will be placed before his Lordship, the Chief Justice.

On this reference the case came up before a Full Bench as constituted above.

K. Rajah Aiyar and *A. Srinivasa Aiyangar* for Appellant.

S. R. Muthuswami Aiyar for Respondents.

The Court expressed the following.

Ramesam, J.

OPINION. *Sir V. Ramesam, J.*—This batch of second appeals arises out of a number of suits for rent for different faslis under S. 77 of the Estates Land Act. There are two holdings under the tenants one holding under patta No. 38 and another holding under patta No. 54. Rent is claimed for portions of the suit holdings at a rate higher than the dry rate on the ground that there are cocoanut gardens in these holdings. In a former litigation between the same parties which culminated in S. A. Nos. 433, etc., of 1924, the same claim was made. The defendant ryot resisted the claim at the higher rate on the ground that a cocoanut plantation was an improvement within the meaning of S. 3 (4) (*f*) of the Estates Land Act and that he is not liable to pay the higher rate and is liable to pay only the dry rate. It was held by Devadoss and Wallace, JJ., that the planting of a cocoanut garden was not an improvement under the Act and that the plaintiff was entitled to the enhanced rate. The same holdings are the subject-matter of the present suits.

It is conceded by the appellant that so far as patta No. 38 is concerned, the cocoanut plantation now existing is merely the

1. (1926) 51 M.L.J. 880: I.L.R. 50 Mad. 482.
2. (1932) 62 M.L.J. 511.

F.B.
Narayana Aiyangar v. Subramanian Chettiar.
Ramesam, J.

old plantation, but as to patta No. 54 it is said that at the time of the former litigation only a portion, namely, 7 karukams, was planted with cocoanut plants but now a larger area is sought to be charged at the higher rate. I will refer to this question of additional area later on. Leaving this aside, two questions arise in the present second appeals. The first is whether cocoanuts are fruits and a cocoanut plantation can be regarded as a fruit garden within the meaning of S. 3 (4) (*f*) of the Estates Land Act. So stated, this question is undoubtedly a question of law, namely, the construction of an Act, the question being whether a particular term in the Act can be so interpreted or defined as to cover a particular class of trees.

Now it may be said that the fruit of the cocoanut tree is not a fruit in one sense of the term but is a nut and apparently this was the view that prevailed with Devadoss and Wallace, JJ., in *Vellayappa Chetti* v. *Subramaniam Chettiar*[1]. But this case was considered in *Sri Raja Bommadevara Chayadevamma* v. *Venkataswawy*[2] by another Bench of this Court (Reilly and Ananthakrishna Aiyar, JJ.) and was dissented from. Both the learned Judges have dealt with the matter at some length and have given good reasons for differing from the former decision and for holding that cocoanut trees are fruit trees. Even Devadoss, J., from whose judgment the latter case came up in Letters Patent Appeal held that cocoanut trees are fruit trees but he does not refer to the judgment in the other case reported in *Vellayappa Chetti* v. *Subramaniam Chettiar*[1]. It is unnecessary to repeat the reasons given by Reilly and Ananthakrishna Aiyar, JJ. I will only add the following considerations. In the Century Dictionary under 'Cocoanut' we have 'the nut or *fruit* of the cocoanut tree.' And then under 'double cocoanut' we have "the fruit of a remarkable palm. . . . . The fruit often weighs 40 or 50 lbs. . . . ." Under 'sea cocoanut' we have 'the fruit of a species of palm.' In Murray's English Dictionary under 'double cocoanut' we have got practically the same sentence repeated. In common parlance the cocoanut is always referred to as a fruit before the fibre is removed.

I therefore hold that cocoanuts are fruits and that cocoanut trees are fruit trees and a cocoanut plantation is a

1. (1926) 51 M.L.J. 880: I.L.R. 50 Mad. 482.
2. (1932) 62 M.L.J. 511.

F.B.
Narayana Aiyangar v. Subramanian Chettiar.
Ramesam, J.

fruit garden within the meaning of S. 3 (4) (*f*) of the Estates Land Act. It follows that the tenant who has effected improvements in these cases ought not to be liable for any additional rent beyond the dry rate.

The next question is how far the defendant appellant is affected by the rule of *res judicata*. As already mentioned, the former decision, which, in the light of our present decision, must be held to be erroneous, was between the same parties and in respect of the same holdings. Mr. Rajah Aiyar, the learned Advocate for the appellant, contends that an erroneous decision of law should not be held to be *res judicata* in a later litigation between the same parties relating to a different year and that the former decision should be confined to the year in respect of which the former litigation arose.

The question how far an erroneous decision on a matter of law on the terms of a tenancy would be *res judicata* has been considered in three decisions of this Court. The first one is *Bayyan Naidu* v. *Suryanarayana*[1]. It was there held that a former decision as to the extent of a holding in a suit between a landlord and tenant relating to the validity of patta under the Rent Recovery Act would be *res judicata* in respect of later years on the ground that it decides a general question not peculiar or special for that particular year. So far as this matter is concerned, the Estates Land Act is similar to the Rent Recovery Act and if any question of general principle is settled in one litigation in respect of one year as regards the terms of patta, that would bind the parties for the future years also until new circumstances intervene. The next decision of this Court that I would refer to is *Sree Rajah Bommadevara Venkata Narasimha Naidu* v. *Andavolu Venkataratnam*[2]. There the suits related to the recovery of a cess claimed by a Zamindar from inamdars. The cess was payable annually. It was held that in cases where in a prior litigation the cess was held to be payable, that decision constitutes *res judicata* in litigation with respect to later years. The conclusion of the learned judges is this expressed:

"Where a decision on a point of law, 'whether it be on the construction of a document or of a statute or on common law or on customary law, settles a question that arises directly out of conflicting views as to the rights of the parties, it is *res judicata*'."

1. (1912) 23 M.L.J. 543: I.L.R. 37 Mad. 70 at 73 (F.B.).
2. (1916) 32 M.L.J. 63.

F.B.

Narayana Aiyangar v. Subramanian Chettiar.

Ramesam, J.

The reason of the judgment may be expressed thus, namely, that the former litigation settles the terms on which the two parties are related to each other in the matter of the holdings provided the decision and the terms are confined to the actual object matter of the suit. The earlier decisions of this High Court in *Parthasarathi* v. *Chinna Krishnan*[1], *Mangalathammal* v. *Narayanaswami Aiyar*[2] and *Natesa Chetti* v. *Vengu Nachiar*[3] were dissented from. In *Maharajah of Jeypore* v. *Ramamurthy*[4] the same view was followed. An attempt to reopen the decision in *Sree Rajah Bommadevara Venkata Narasimha Naidu* v. *Andavolu Venkataratnam*[5] based on the decision of the Privy Council in *Broken Hill Proprietary Co., Ltd.* v. *Broken Hill Municipal Council*[6] was made but failed. That attempt is again repeated before us, Mr. Rajah Aiyar contending that the decision in *Sree Rajah Bommadevara Venkata Narasimha Naidu* v. *Andavolu Venkataratnam*[5] and *Maharajah of Jeypore* v. *Ramamurthy*[4] should be reconsidered in the light of the Privy Council decision just mentioned. In the same volume we have got *Hoystead* v. *Commissioner of Taxation*[7] another decision of the Privy Council. The earlier decision relates to the valuation of land for rating purposes. The second decision relates to land-tax assessment and it was held that an admission on a fundamental matter in a prior case and a decision stands on the same footing, estops a different contention in a later case. At first sight it looks as if these two decisions are in conflict. Possibly the earlier decision may be explained on the footing that the valuation of land for purposes of rating for each year is so peculiar to that year and has to be made on considerations confined to that year and should be so uninfluenced by considerations that prevailed in prior years that no question should be considered as a general principle and what happened in one year—whether a matter of principle or a matter of detail—should not be used in another year and therefore the decision of one year is not *res judicata* for another year. If that decision is not to be explained in that way and should not be regarded as inconsistent with the decision in *Hoystead* v. *Commissioner of Taxation*[7] I prefer to follow the latter deci-

1. (1882) I.L.R. 5 Mad. 304.
2. (1907) 17 M.L.J. 250: I.L.R. 30 Mad. 461.
3. (1909) 20 M.L.J. 20: I.L.R. 33 Mad. 102.
4. (1933) 65 M.L.J. 684.
5. (1916) 32 M.L.J. 63.
6. (1926) A.C. 94.
7. (1926) A.C. 155.

F.B.

Narayana Aiyangar v. Subra-manian Chettiar.

Ramesam, J.

sion. This is practically the view accepted in *Maharajah of Jeypore* v. *Ramamurthy*[1] as to these two cases. These cases have also been considered in *Sankaralinga Nadar and Brothers* v. *The Commissioner of Income-tax, Madras*[2] and a similar view was taken there of the first case.

It is said that in cases under the Bengal Tenancy Act it has been held that a decision between landlord and tenant as to the rate of rent in a prior year does not constitute *res judicata* in later years when the question comes up. But even there it has been held that where the earlier decision decides a matter of general principle, it would be *res judicata* in later years, *vide Gnanada* v. *Nalini Bala Debi*[3] and *Sreemati Ayetonnessa Bibi* v. *Amjad Ali*[4]. It is true that in Calcutta a view prevailed at one time similar to the decision in *Mangalathammal* v. *Narayanaswami Aiyar*[5], *Alimunnissa Chowdhurani* v. *Shama Charan Roy*[6] but this decision has since been overruled by that Court in *Tarini Charan Battacharya* v. *Kedar Nath Haldar*[7].

It is then argued by Mr. Rajah Aiyar relying on a passage in this last judgment that some exception should be made to the principle of *res judicata* in matters of jurisdiction, limitation or procedure on grounds of public policy. It is difficult to conceive how the question of *res judicata* can arise for the same object matter in later years with reference to questions of jurisdiction, limitation or procedure. But here we are not concerned with any such question. It is suggested that the rules of the Estates Land Act are based on public policy and some exception should be made in such matters. We are not referred to any principle or authority to support such a proposition and I am unable to accept this contention. But as already observed, the principle of *res judicata* should be confined only to matters which actually existed at the time of the former decision. If there are new areas in patta No. 54 which were not planted with cocoanut at the time of the former suit and in respect of which no claim for enhanced rate of rent was or could be made in the former suit, the matter is not *res judicata* in the present suit in respect of such areas. The

1. (1933) 65 M.L.J. 684.
2. (1929) 58 M.L.J. 260: I.L.R. 53 Mad. 420 (F.B.).
3. (1925) 43 C.L.J. 146.
4. (1928) 48 C.L.J. 184.
5. (1907) 17 M.L.J. 250: I.L.R. 30 Mad. 461.
6. (1905) I.L.R. 32 Cal. 749.
7. (1928) I.L.R. 56 Cal. 723 (F.B.).

F.B.

Narayana Aiyangar *v.* Subramanian Chettiar.

Ramesam, J.

respondent contended that even in respect of such areas the question of general principle is settled between the parties. There can be no *res judicata* laying down a wrong rule of law between parties for future guidance also. The decision must be confined to the matter to which it has been applied at the time of the former decision. Areas and trees to which it was not applied then will be governed by the correct principle of law. It is said by the respondent that this matter was not raised earlier. The appellant claims that he did raise it. However the consideration of this question and how far the matter may be allowed to be raised are points which we leave to the learned judge who would dispose of the second appeal in the light of the above observations, and if, in his discretion, he thinks fit, he can allow those points to be raised in second appeal. It is for him and not for the Full Bench to consider this question.

With these observations these cases are remitted to the learned judge for disposal.

Beasley, C.J.

Sir Owen Beasley, C.J. :—I agree.

King, J.

King, J. :—I agree.

These appeals coming on for final hearing after the expression of the above opinion of the Full Bench, the Court delivered the following

Varadachariar, J.

JUDGMENT (8th February, 1935). *Varadachariar, J.*—Now that the Full Bench have held that the decision in *Vellayappa Chetty* v. *Subramaniam Chettiar*[1] will operate as *res judicata* in respect of the areas then in question, it follows that S. A. Nos. 1148, 1150 and 1181 of 1932 fail and must be dismissed with costs in S.A. No. 1148 of 1932 only.

S. A. Nos. 1149 and 1151 arising respectively from S. S. Nos. 2627 of 1923 and 3861 of 1926 relate to lands covered by patta No. 54. Even in respect of these lands, the former judgment will operate as *res judicata* except to the extent to which it can be said that in these second appeals which relate to later faslis the claim for rent is made in respect of lands brought under cocoanut cultivation after the date of the previous suits relating to these pattas. Mr. Rajah Aiyar states that in the former suits the claim at Rs. 2 per karukam was made only in respect of 7 karukams whereas in the present suits that

1. (1926) 51 M.L.J. 880: I.L.R. 50 Mad. 482.

F.B.

Narayana Aiyangar v. Subramanian Chettiar.

Varadachariar, J.

rate is claimed in respect of 9 karukams and likewise the Rs. 5 rate in respect of the later faslis.

A distinction is sought to be suggested between the claim at Rs. 2 rate and the claim at Rs. 5 rate and it is argued that the rule of *res judicata* ought not to be applied at any rate to the extent of upholding the Rs. 5 rate claim. I am not able to agree with this contention. The decision of the Full Bench implies that the allowance of the Rs. 2 claim was on the footing that the contention that the tenant was not liable to pay in respect of improvements effected by him was not available to him by reason of the rule of *res judicata*. Once that contention is put aside, the contract alleged by the landlord is that up to a particular stage he is entitled to rent at Rs. 2 per karukam and at later stages he is entitled to rent at Rs. 5 per karukam. I therefore do not see any justification for saying that though on the basis of Rs. 2 it is *res judicata* the claim is for the same land at later stages at the rate of Rs. 5 will not be *res judicata*.

Mr. Rajah Aiyar further suggests that the written statement in S. S. Nos. 2627 of 1923 and 3861 of 1926 raised a question of *fact* that the trees have not in fact reached the stage when even on the basis of the agreement as alleged by the plaintiff the rent at Rs. 2 or Rs. 5 could be claimed at all. I see nothing of this contention put forward either before the Deputy Collector or before the lower appellate court. I am not satisfied that any evidence which the defendant wanted to offer to substantiate this contention was shut out. I am therefore unable to allow that point to be raised at this stage.

A further point was sought to be raised by Mr. Rajah Aiyar on the construction of the contract relied on by the plaintiff, namely, that the mere fact that one tree or some trees begin to put forth spathe will not justify the landlord in claiming the higher rate of rent in respect of the whole area under cocoanut cultivation. This point too does not appear to have been raised in any of the Courts below. It cannot be said to be really a matter of law or construction which can be dealt with in second appeal. It will really have to be considered in the light of the course of conduct of the parties or usage in the neighbourhood and I must therefore disallow it also, as a point not raised up to this stage and which cannot be disposed of without further evidence.

F.B.

Narayana Aiyangar *v.* Subramanian Chettiar.

Varadachariar, J.

Mr. Muthusami Aiyar on behalf of the respondents is unable to state definitely whether Mr. Rajah Aiyar's contention that in the old suits the claim was made and decreed only in respect of 7 karukams, whereas in the present suit the claim was made in respect of 9 karukams, is borne out by the record or not. But having regard to the fact that the rule of *res judicata* has got to be applied practically against the spirit of the provision made in the statute and seeing that the rule of decision in a matter of this kind has been the subject of so many conflicting pronouncements, I am not prepared to disallow this point raised by Mr. Rajah Aiyar, which, after all, can be determined from the records of the Court or at any rate from the relevant pattas. The District Judge is accordingly requested to make a report, after giving an opportunity to both the parties to place all relevant materials before him, whether the claim in S. S. Nos. 2627 of 1923 and 3861 of 1926 in so far as it relates to cocoanut plantation, is in respect of any area in excess of that which formed the subject-matter of S. S. Nos. 2582 of 1918 and 1638 of 1920, and if so, what is the extent of the excess area. The report to be sent before the 15th April, 1935.

B. V. V. ——— *Order made.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VARADACHARIAR.

S. Thirumalamuthu Adaviar .. *Appellant** (*1st Defendant*)

v.

Minor Subramania Adaviar by Court guardian S. Rajarama Aiyar, Advocate, High Court (*Vide* Order dated 23rd October, 1933, in C. M. P. No. 5054 of 1933) and two others .. *Respondents* (*1st Plaintiff, 2nd Defendant and 2nd Plaintiff*).

Thirumalamuthu Adaviar *v.* Subramania Adaviar.

Hindu Law—Decree against father alone—Sons not parties to suit or pronote—Partition after decree to defeat creditor—Partition real and operative —If creditor can execute the decree against properties allotted to sons.

Where after the passing of a money decree against the father alone in a suit on a promissory note executed by him, a partition was effected between the father and his minor sons for the very purpose of preventing the decree-holder from executing his decree against the properties that might be

*S. A. No. 504 of 1932. 4th November, 1936.

Thirumalamuthu Adaviar v. Subramania Adaviar.

allotted to the shares of the minor sons, and in that sense only fraudulently or *mala fide*, the decree-holder is precluded from executing his decree against the properties allotted to the shares of the sons in that partition. If the partition is colourable and such as to lead the Court to come to the conclusion that it was not intended to be operative at all, then it can be ignored and the creditor can execute his decree against all the properties, but if it is merely a fraud upon the father's creditor's rights to execute but otherwise real, then for purposes of execution, such partition cannot be ignored.

Doraiswami v. *Nagaswami*, A.I.R. 1929 Mad. 898, distinguished.

The observation in *Krishnaswamy Konan* v. *Ramaswami Aiyar*, (1899) 9 M.L.J. 127: I.L.R. 22 Mad. 519 in as far as it suggests that the partition should be ignored and the sons treated as if they still continued to be joint with their father distinguished as *obiter*.

Appeal against the decree of the District Court of Tinnevelly in A.S. No. 73 of 1931 preferred against the decree of the District Munsiff of Ambasamudram in O.S. No. 95 of 1930.

P. N. Appuswamy Aiyar for Appellant.

S. Rajarama Aiyar for Respondents.

The Court delivered the following

JUDGMENT.—This second appeal arises out of a suit brought by two minors for a declaration that the properties which according to them fell to their shares at the partition evidenced by Ex. A are not liable to be seized in execution of the decree obtained against their father in S. C. S. No. 831 of 1928 on the file of the Sub-Court of Tinnevelly. The lower appellate court granted the declaration; hence this appeal by the decree-holder. The partition under Ex. A was effected soon after the passing of the decree in the small cause suit and in such suspicious circumstances that both the lower courts have taken the view that it must have been brought about for the very purpose of preventing the decree-holder in the small cause suit from executing his decree against the properties that might be allotted to the shares of the minor sons. In that sense, the partition may be said to be fraudulent or *mala fide*, and I see no reason to differ from that conclusion, though I must point out that that conclusion can be based only upon inferences from the proximity of dates and the fact that the plaintiffs being minors, there was no other reason for partition at that particular juncture. No oral evidence has been adduced in this case. The point for determination in the second appeal is, taking the partition to be fraudulent in that sense, has it the effect of precluding the decree-holder from executing

Thirumalamuthu Adaviar v. Subramania Adaviar.

his decree against the properties allotted to the shares of the sons in that partition?

So far as the decisions in this Court go, there can be little doubt that but for the fraudulent purpose of the partition the decree-holder cannot reach the son's shares in execution of the decree obtained against the father alone. Mr. Appuswami Aiyar has invited my attention to the decisions in the other High Courts which reveal considerable conflict of judicial opinion on the question of the executability of a decree obtained against the father alone as against the shares allotted to his sons at a partition. Some of them proceed on the footing that there is no justification for drawing a distinction between liability in a separate suit against the sons and the liability of the shares to be proceeded against in execution of the decree obtained against the father. In some, the decision of a Full Bench of this Court in *Subramania Aiyar* v. *Sabapathy Aiyar*[1] is regarded as warranting the above view, though, with all respect, I would observe that this does not appeal to me to be correct. In some cases again a distinction is drawn between a partition which takes place after the money decree has been obtained against the father and a partition which takes place before the money decree. This distinction is based on the ground that, where the decree is obtained before partition, though execution proceedings may be started after partition, the father might well be deemed to have been sued in a representative character and that therefore the decree, though in name only against the father might well be treated as a decree against the sons as well. It is sufficient for my present purpose to say that it will be difficult to apply this theory of representation when a suit is brought against the father on a promissory note executed by himself. It has often been pointed out that in a suit of that kind, the cause of action against the father is on the note and the cause of action as against the sons is on their Hindu Law liability, and it is difficult to speak of the father as "representing" the sons in a suit on a promissory note when it will not be open to him to raise defences which will undoubtedly be open to the sons if they had been impleaded in the suit. Another line of authority draws a distinction between cases of *bona fide* partition and of fraudulent partition, and founding themselves upon the observations

1. (1927) 54 M.L.J. 726: I.L.R. 51 Mad. 361 (F.B).

Thirumalamuthu Adaviar v. Subramania Adaviar.

in *Krishnaswamy Konan* v. *Ramaswamy Aiyar*[1] they hold that where the partition is fraudulent the decree obtained against the father may even be executed against the properties allotted to the sons at such partition. Even if this view could be held to be right, there is considerable difference of opinion in the authorities as to what is exactly meant by the expression 'fraudulent partition'. If as was held in *Indar Pal* v. *The Imperial Bank*[2] the partition is found to be colourable there should be no difficulty in ignoring it. If, on the other hand, it is merely what must be described as a fraud upon creditors, I do not see any justification for holding that for purposes of execution, such partition can be ignored.

That the expressions '*bona fide* partition' and '*mala fide* partition' have been differently understood by different judges and on different occasions can be gathered from the observations in *Jagannatha Rao* v. *Viswesam*[3], *Kishan Sarup* v. *Brijraj Singh*[4], *Gaya Prasad* v. *Murlidhar*[5] and *Atul Krishna Roy* v. *Lala Nandanji*[6]. I must also point out that when one speaks of a fraudulent partition brought about by a father with a view to defeat his creditors, two questions may be intended to be comprised in the consequences sought to be deduced therefrom. One is with reference to the possibility of the father allotting to himself a much smaller share than he would be otherwise entitled to. An objection on this score would presumably be one to be dealt with under S. 53 of the Transfer of Property Act. (Cf. *Veerappa Chettiar* v. *Annamalai Chettiar*[7].) The other consequence sought to be implied is that the partition should be ignored and the sons treated as if they still continued to be joint with their father. No doubt the observation in *Krishnaswamy Konan* v. *Ramaswamy Aiyar*[1] would seem to support such a contention. But the observation was only made as a reservation in that case and could scarcely be treated as a decision by itself.

Dealing with the matter on principle, it is difficult to see how the mere fact that members of a family who are in law entitled to enter into a partition at any time they choose, happen

---

1. (1899) 9 M.L.J. 127: I.L.R. 22 Mad. 519.
2. (1915) I.L.R. 37 All. 214.
3. (1924) 46 M.L.J. 590: I.L.R. 47 Mad. 621 at 624.
4. (1929) I.L.R. 51 All. 932 at 936, 937, 946.
5. (1927) I.L.R. 50 All. 137 at 141.
6. (1935) I.L.R. 14 Pat. 732 (F.B.).
7. (1934) 68 M.L.J. 157.

Thirumalamuthu Adaviar *v.* Subramania Adaviar.

to enter into a partition at a time more inconvenient to a creditor can make it fraudulent in the sense that the creditor can ignore it. The law provides ways, in which the creditor can avoid any injurious consequences arising therefrom, namely, by impleading the sons in the action that he may bring against the father, because it is now well established by the preponderance of authority in nearly all the Courts that a partition will not defeat the rights of the creditor, though it may have some bearing on the procedure to be followed by him for the realisation of his debt.

Having regard to the above considerations, I do not think I need do more than refer to the cases cited by Mr. Appuswami Aiyar on behalf of the appellant, namely, *Kishan Sarup* v. *Brijraj Singh*[1], *Jawahar Singh* v. *Parduman Singh*[2], *Atul Krishna Roy* v. *Lala Nandanji*[3] and *Raghunandan Pershad* v. *Moti Ram*[4]. *Annabhat Shankarbhat* v. *Shivappa Dundappa*[5] and *Suryanarayana* v. *Viswanadham*[6] do not help the appellant, because in those cases the person who wanted to get his property exempted from the attachment was a party to the money decree or the question of his liability was raised in the course of the money suit itself. *Duraiswami* v. *Nagaswami*[7] may no doubt appear to be in favour of the appellant's contention. But, rightly or wrongly, the learned Judges based their decision on the ground that in that case the objecting sons had been impleaded as parties to the suit against the father, though in that suit they were exonerated. It is not for me to canvass the correctness of that decision, but the learned Judges expressly make this circumstance the distinguishing factor when they refer to the observations of Ananthakrishna Aiyar, J., in *Subramania Aiyar* v. *Sabapathy Aiyar*[8]. The view taken in *Kameswaramma* v. *Venkata Subba Rao*[9] has been consistently followed in this Court to the extent of recognising the distinction between the right of the creditor to proceed by a separate suit against the sons even after partition and his right to attach the sons' shares in execution of the decree obtained against the father. (Cf.

1. (1929) I.L.R. 51 All. 932.
2. (1932) I.L.R. 14 Lah. 399.
3. (1935) I.L.R. 14 Pat. 732 (F.B.).
4. (1929) I.L.R. 6 Luck. 497 (F.B.).
5. (1928) I.L.R. 52 Bom. 376.
6. (1936) 71 M.L.J. 518.
7. A.I.R. 1929 Mad. 898.
8. (1927) 54 M.L.J. 726: I.L.R. 51 Mad. 361 (F.B.).
9. (1915) 27 M.L.J. 112: I.L.R. 38 Mad. 1120.

Thirumalamuthu Adaviar v. Subramania Adaviar.

Bapiraju v. *Sreeramulu*[1]. See also *Veerappa Chettiar* v. *Annamalai Chettiar*[2] and Appeal No. 25 of 1932.) If, as recognised in *Krishnaswamy Konan* v. *Ramaswamy Aiyar*[3] and *Kameswaramma* v. *Venkata Subba Rao*[4], the attachability of the sons' shares depends upon the power of the father to alienate it *at the time the creditor seeks to attach the same*, it is difficult to see how the fact of the partition being one intended to defraud creditors can make any difference. If it was intended to be operative and is in law operative, to bring about a division in status between the father and the sons, the father's power of alienating the shares allotted to the sons at such partition must have come to an end and with it the right of the creditor to attach such shares.

The question of the *bona fides* or *mala fides* of the partition has been referred to in some of the decisions for another reason, namely, the suggestion sometimes made that if the partition was *bona fide*, in the sense that sufficient provision has been made therein even for the discharge of the debts of the father, the shares allotted to the sons at such partition ought not to be held liable at all in any kind of proceeding for the pre-partition debts of the father. Whether that proposition is well founded or not, that appears to have been the reason for drawing the distinction in some of the cases between *bona fide* partitions and fraudulent partitions. Except in cases where the *mala fide* character of the partition is such as to lead the Court to come to the conclusion that the partition was not intended to be operative at all, I am unable to see how the *mala fide* character bears on the question of the creditor's rights to attach the sons' share in execution of a decree obtained against the father alone. I am therefore of opinion that the conclusion of the lower appellate Court is right. The second appeal fails and is dismissed with costs.

Leave granted.

S. V. V. —— *Appeal dismissed.*

---

1. (1934) 40 L.W. 588.
2. (1934) 68 M.L.J. 157.
3. (1899) 9 M.L.J. 127 : I.L.R. 22 Mad. 519.
4. (1915) 27 M.L.J. 112 : I.L.R. 38 Mad. 1120.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VARADACHARIAR AND MR. JUSTICE BURN.

Km. Kr. Km. Kuppan Chettiar and others .. *Appellants** *(Plaintiffs)*

v.

Masa Goundan and others .. *Respondents (Defendants 2 to 5 and 1st Defendant).*

Kuppan Chettiar *v.* Masa Goundan.

Hindu Law—Father—Debts of father—Partition between father and sons—Shares to father and sons and maintenance provision for wife and daughters—Decree after partition against father alone—If creditor can proceed in execution against other properties not allotted to father—Civil Procedure Code, S. 60—Effect of, on creditor's right.

After a genuine partition, in the sense of a real and not a mere sham partition, the father's power to sell the property for his debts ceases and therefore the right of a father's creditor who has obtained a money decree against the father alone, in respect of a pre-partition debt, to proceed in execution against the properties allotted to the son's share or against the properties set apart at such a partition for the maintenance of his wife and marriage expenses of his daughters is also at an end as they cease to be properties of the judgment-debtor (father) or properties over which, or over the profits of which the judgment-debtor (father) has a disposing power, which he may exercise for his own benefit within the meaning of S. 60, Civil Procedure Code. It is not material for the purpose of execution proceedings to consider whether the partition is *bona fide* or not, in the sense that it has made sufficient provision for the discharge of the father's debts or whether the decree-holder was or was not aware of the partition.

Where, therefore, a father entered into a genuine partition with his sons at which (1) certain specific properties were allotted to the shares of the sons; (2) some properties were set apart for the maintenance of his wife and marriages of his daughters with a further provision that they should be divided after their lifetime between the sons; and (3) a share was allotted to the father which was not shown to be insufficient for the discharge of his debts subsisting at the time of the partition and for his maintenance, a creditor of the father who obtained a money decree after the partition against the father alone, though in respect of a pre-partition debt, is not entitled in execution to proceed against properties allotted to the sons or for the wife and daughters.

Appeal against the decree of the Court of the Subordinate Judge of Coimbatore in A. S. No. 8 of 1932 (A. S. No. 297 of 1931, District Court) preferred against the decree of the Court of the District Munsif of Gobichettipalayam in O. S. No. 66 of 1929.

R. Gopalaswamy Ayyangar for Appellants.

B. Somayya and *D. R. Krishna Rao* for Respondents.

---

* S. A. No. 1120 of 1932. 14th December, 1936.

Kuppan Chettiar v. Masa Goundan.

Varadachariar, J.

The Court delivered the following

JUDGMENTS. *Varadachariar, J.*—This second appeal arises out of a suit instituted by the legal representatives of a decree-holder to get a claim order set aside.

The father of the plaintiffs obtained a money decree against the first defendant on 17th September, 1926 on three promissory notes executed by the first defendant, Exs. D, D-1 and D-2. Between the dates of Exs. D and D-1 a partition arrangement was entered into between the first defendant and his sons, defendants 2 to 5. (*Vide* Ex. V, dated 13th October, 1925.) It is alleged that the plaintiff's father was not aware of this partition and so happened to make further advances to the first defendant under Exs. D-1 and D-2 in the course of November and December 1925. The suit, O. S. No. 1400 of 1926, was instituted for the recovery of money due under these three promissory notes but the first defendant alone was impleaded as defendant thereto and a decree was obtained in due course. When the plaintiffs proceeded to attach certain properties in execution of this money decree the defendants 2 to 5 came forward with a claim petition and prayed that the properties which had fallen to their shares under Ex. V should be released from attachment. As the properties were accordingly released, the plaintiffs filed this suit to obtain a declaration that they are entitled to attach the properties which the defendants 2 to 5 claimed to have fallen to them in the partition.

The question for determination is whether, in spite of the partition evidenced by Ex. V, the shares taken by defendants 2 to 5 are liable to be proceeded against in execution of the money decree obtained against the father alone. I have dealt with this question at some length in a judgment recently delivered by me in *Thirumalamuthu Adaviar* v. *Subramania Adaviar*[1] and I do not propose to repeat what has been said there. I shall only add that the case for the decree-holder was much stronger in that case than in the present instance because in that case I proceeded on the footing that the partition was entered into with a view to defeat the creditor.

Whatever may be the rights under the Hindu Law of a father's creditor to secure satisfaction of the debts due by the father from the son's shares in the joint family, the question

1. (1937) 1 M.L.J. 243.

Kuppan Chettiar v. Masa Goundan. — Varadachariar, J.

arising for determination in this second appeal has to be decided with reference to the language of S. 60 of the Civil Procedure Code. In order that properties may be liable to attachment in execution, it must be shown that they either belong to the judgment-debtor or that the judgment-debtor has a disposing power over the properties or their profits, which power he may exercise for his own benefit.

It is well settled and the proposition has now been placed beyond doubt by the observations of their Lordships of the Judicial Committee in *Sat Narain* v. *Rai Bahadur Sri Kishen Das*[1] that the father's power of sale for his debts exists only so long as the joint family remains undivided. Their reference with approval to the decision of this Court in *Baluswami Aiyar*, In re[2], shows that even a division in status will suffice to put an end to this power. It would therefore follow that after a division in status the father's creditor cannot, any more than the Official Assignee, claim that the property is saleable by the father and therefore attachable by himself. That the position is different as regards the creditor's remedy by independent suit against the sons has been recognised by the judgment of a Full Bench of this Court in *Subramania Aiyar* v. *Sabapathy Ayyar*[3]. Having regard to this well-understood distinction between the creditor's remedy in execution and the creditor's remedy by a separate suit, we are with due respect unable to follow the observations which were cited to us from certain decisions of the other High Courts which either ignore this distinction or proceed on a basis different from the Full Bench decision in *Subramania Aiyar* v. *Sabapathy Ayyar*[3], and hold that after a *bona fide* partition the father's creditor will not even have a right of suit against the sons.

In the above view, it seems to me unnecessary to consider how far the contention on the one side or the other as to whether the partition in this case can be described as *bona fide* within the meaning of the authorities is tenable. In my judgment in *Thirumalamuthu Adaviar Subramania Adaviar*[4], I have endeavoured to show that the expression "*bona fide* partition" has been used by different learned Judges in different senses. If, as recognised by their

1. (1936) 71 M.L.J. 812: L.R. 63 I.A. 384: I.L.R. 17 Lah. 644 (P.C.).
2. (1928) 55 M.L.J. 175: I.L.R. 51 Mad. 417 (F.B.).
3. (1927) 54 M.L.J. 726: I.L.R. 51 Mad. 361 (F.B.).
4. (1937) 1 M.L.J. 243.

Kuppan Chettiar *v.* Masa Goundan.

Varadachariar, J.

Lordships of the Judicial Committee in the recent case, the father's power to sell is at an end once there is a genuine partition, it does not seem to me material for the purpose of execution proceedings to consider whether the partition is *bona fide* or not, in the sense that it has made sufficient provision for the discharge of the father's debts. Their Lordships, no doubt, recognise that in a suit for partition it is proper that the Court should make provision for the discharge of the father's debts and that the remaining property alone should form the subject-matter of division between the coparceners. But it nevertheless seems to me too much to say that, except in cases where the father's debts are specifically referred to and provided for in a partition deed, the partition deed cannot be regarded as a *bona fide* partition arrangement. In the present case the finding of the lower appellate Court is not merely that the partition was not nominal but that the plaintiffs had not shown that the share allotted to the first defendant was not enough for the discharge of his debts subsisting at the time of the partition and for his maintenance. There are, no doubt, *dicta* in some of the cases which go so far as to lay down that, unless the partition not merely makes provision for the discharge of the existing debts but allots in addition a share to the father equal to the shares allotted to the sons, it should not be regarded as a *bona fide* partition. As at present advised, I am unable to concur in that view. But, having regard to the limited scope of the question to be determined in this second appeal, it seems to me unnecessary to express any final opinion on that question.

Some of the cases in the other High Courts draw a distinction between a partition which takes place after the money decree had been obtained against the father and a partition which takes place before the money decree. In that connection I may point out that in the present case the partition took place nearly a year before the passing of the decree in the money suit and that the suit comprised claims under two promissory notes in respect of which moneys were advanced only after the partition. It is only the claim under Ex. D, a promissory note for Rs. 500 that had accrued due before the partition. It does not seem to be material whether the plaintiffs' father was or was not aware of the partition. Both the Courts have found that there was no particular attempt to keep the partition concealed from the creditors and we find that the partition deed

was presented for registration the very next day after execution.

I am not sure if it is possible to split up a decree like the one obtained by the plaintiffs' father in this case and give the decree-holder a right of execution against the sons' shares in respect of so much of it as may represent the claim under Ex. D which alone was a pre-partition debt. But that question also is immaterial in the view I have taken. The Lower Appellate Court was, in my opinion, right in dismissing the plaintiffs' suit.

A further point was raised before us that at least in respect of the properties comprised in the D schedule to the partition deed, the plaintiffs must be entitled to execute the decree obtained by their father. I am unable to accede to this contention. It has, no doubt, been held that the claim which a wife has under the Hindu Law for maintenance against her husband cannot take precedence over the claims of his creditors, and the same principle has been applied to a widow's claim for maintenance against her husband's estate. But that is not exactly the position here. I am not satisfied that the learned counsel for the appellant was correct in the contention that, even when a partition takes place in a joint Hindu family, the Hindu Law does not permit of a provision being made by allotment of property for the maintenance of the wife and for the marriage of the daughters as long as the father is alive. The wife has, no doubt, a personal claim for maintenance against her husband independently of the possession of any property, but that does not exclude the liability of the coparcenary property to provide for her maintenance, at any rate when the whole family property is made the subject of a partition between the father and the sons. In the present case the allotment has been made not merely for the benefit of the wife and the daughters but also with a further provision that the properties so allotted to them should be divided after their lifetime by the sons. Applying the test involved in the language of S. 60 of the Civil Procedure Code, it is impossible to hold that the father any longer continued to have the power of disposing of the property that was allotted to his wife and daughters with remainder over to his sons.

Mr. Gopalaswami Aiyangar finally asks that the suit may at least be permitted to be treated as a suit to recover money

Kuppan Chettiar v. Masa Goundan.

Varadachariar, J.

from the sons in respect of the claim due under the promissory note, Ex. D. We regret we are unable to accede even to this prayer. It will be wholly changing the nature of the suit, and *prima facie* the suit has been instituted more than three years after the date of Ex. D. We do not feel that we are justified in allowing the change of the basis of the claim without further information clearly available from the record that the money claim would not be barred by limitation.

The result is that the second appeal fails and is dismissed with costs.

Burn, J.

Burn, J.—I agree that the second appeal must be dismissed with costs, and I have very little to add. The finding is clear in this case that the partition was a genuine partition, a real transaction and not a mere sham. And that being so, it is clear that it put an end to the joint family in which the first defendant was the father. The motive which was behind this partition is, I think, irrelevant. It follows from the decision in the case *Baluswami Ayyar*, In re[1] (in which it was clear that the partition suit was filed on behalf of the minor sons in order to defeat the claim of the Official Assignee who wished to exercise the father's power of disposal of his minor sons' shares) that, even if a partition is entered upon in order to defeat the claims of creditors nevertheless, provided that it is a genuine partition, division of status takes place, and the power of the father to sell the shares of the sons is brought to an end. If that be so, there can be no possibility of the decree-holder pursuing the shares of the sons in execution of the decree obtained against the father alone.

Second Appeal dismissed.

S.V.V.

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Patna.]

PRESENT:—LORD ROCHE, SIR SHADI LAL AND SIR GEORGE RANKIN.

Hazariram Marwari and others .. *Appellants**

v.

Rai Bahadur Bansidhar Dhandhania and others .. *Respondents.*

P.C.

Hazariram Marwari v. Rai Bahadur Bansidhar Dhandhania.

Civil Procedure Code (V of 1908), O. 21, rr. 18 and 20—Principles governing set-off of decrees—Mortgage and money decrees—Whether can be set off

---

1. (1928) 55 M.L.J. 175: I.L.R. 51 Mad. 417 (F.B.).

* P. C. Appeal No. 82 of 1935. 16th December, 1936.

as against each other—Personal liability of mortgagor whether condition precedent—Decree in favour of several persons—Set-off in respect of decree against one—Consent by other parties—Effect.

P.C.

Hazariram Marwari *v.* Rai Bahadur Bansidhar Dhandhania.

R. 20 of O. 21, Civil Procedure Code, which was newly inserted in 1908 was intended to settle, as regards set-off, a conflict of decisions as to whether a mortgage decree was within the description of "decree for the payment of money" or "money decree". There is nothing in the language of the rule or in the reason of the matter to justify the interpretation that it should be applied only where both decrees are mortgage decrees. Nor can the words "decrees for sale in enforcement of a mortgage or charge" in the rule be restricted to personal judgments such as may be given under O. 34, r. 6 of the Code.

Held, that a decree for mesne profits can be set-off as against a mortgage decree when in respect of the mortgage the personal liability of the mortgagor subsists.

Quaere: Whether a personal decree can be set-off as against a mortgage decree in the absence of any personal liability on the part of the mortgagor who holds the money decree.

Under rr. 18 to 20 of O. 20 of the Code the set-off of decrees is not a discretionary matter depending upon equitable considerations such as may emerge from the circumstance that both decrees arise out of the same transaction. The principle of the rules is that whatever they arise from, circuity of proceedings thereunder should be avoided. Thus if *X* has a decree against *A*, and *A* and *B* have a decree against *X*, and *A* and *B* both ask for the set-off, the Court should permit the set-off treating *B* at his own request as having released his right to *A*.

Appeal from a decree of the High Court of Judicature at Patna dated 6th February, 1933, reversing a decree or final order of the Subordinate Judge of Godda dated 11th April, 1931, which had been passed in certain execution proceedings.

The facts of the case were as follows:—

Certain persons who may be compendiously referred to as the Barhams obtained a money decree for Rs. 81,398 in the High Court of Judicature at Patna on the 15th January, 1924 against respondents Nos. 3, 12 and 13. The appellants purchased the decree on 12th November, 1925, and, after getting their names substituted on the record sought to execute the same on the 17th February, 1926, against the judgment-debtors above mentioned, in the Court of the Subordinate Judge of Godda. The respondents Nos. 1 to 16 are persons or represent persons who on the 18th December, 1925 obtained a final mortgage decree in the Court of the Additional Subordinate Judge of Bhagalpur against the Barhams (the mortgagors) and certain other persons (who are or are represented by the respondents Nos. 17 to 36). The latter had been joined as having an interest in the mortgage security. The decree directed the sale of the mortgaged property in order that the respondents 1 to 16 should be paid a sum of Rs. 86,612 costs and further interest. On the 19th September, 1928, the respondents 1 to 16 filed an application in the execution proceedings referred to in paragraph 2 claim-

P.C.
Hazariram Marwari
v.
Rai Bahadur Bansidhar Dhandhania.

ing in effect under the provisions of S. 47 and O. 21, r. 18 of the Code of Civil Procedure, that the two decrees should be treated as cross-decrees, that the decree purchased by the appellants should be treated as satisfied and that the decree of the respondents 1 to 16 should be executed to the extent of the difference between the two decrees. The Subordinate Judge held that the two decrees could not be treated as cross-decrees under the rule and dismissed the application. The High Court held that they could be so treated and that the application succeeded. According to the judgment of the High Court the mesne profits decree and the mortgage decree were cross-decrees within the meaning of the rule, for the reasons, that regard must be had to the substance and not to the form: that the judgment-debtors of the one were the decree-holders of the other and *vice versa*; that the two decrees related to the same transaction and the rights and liabilities of the parties arose out of the same set of facts, namely, the possession of the auction purchasers under a sale which was subsequently set aside; that the fact that in the mesne profits decree only three persons were made judgment-debtors as the sale was in their names only would not affect the case, the difference being in form and not in substance; that the joinder of the Mandals in the mortgage decree did not affect the position, that they were only joined as being interested in the equity of redemption and that they were not judgment-debtors in the sense in which the Barhams were judgment-debtors, namely, persons liable to pay; and that the question whether the respondents 1 to 16 were the auction purchasers was *res judicata* as between them and the Barhams and so *res judicata* as between the respondents 1 to 16 and the appellants who were claiming through the Barhams.

L. De Gruyther, K.C. and *T. J. Strangman* for Appellants.—The mesne profits decree was against only three out of respondents 1 to 16 whereas the mortgage decree was in favour of all of them. R. 18 of O. 21 of the Code of Civil Procedure has no application to this case. The decree for mesne profits is a decree for payment of money within the Code. R. 20 of O. 21 has no application either. The mortgage decree is not a decree for payment of money within the Code because (1) it is a decree for sale, (2) it is not between the same parties, (3) it is not capable of execution at the same time, and (4) it is not of the same character. You cannot set off a decree for payment of money against a decree for the enforcement of a sale. Refers to *Nagar Mal* v. *Ram Chand*[1], *Sheo Shankar* v. *Chunni Lal*[2], *Burma Oil Co.* v. *Ma Tin*[3], *Venkata*

1. (1910) I.L.R. 33 All. 240. 2. (1916) I.L.R. 38 All. 669.
3. (1929) I.L.R. 7 R. 505.

P.C.

Hazariram Marwari v. Rai Bahadur Bansidhar Dhandhania.

Reddi v. *T. V. Dorasami Pillai*[1] and *Ram Chander Upadhya* v. *Mahabir Singh*[2],

A. M. Dunne, K.C. and *W. Wallach* for Respondents.—The provisions of O. 21, rr. 18, 19 and 20 of the Code apply to the facts of this case. The respondents are entitled to execute the decree for the whole amount as against the Barham judgment-debtors. Refers to O. 21, r. 18 (4), illus. (*d*); *Hury Doyal* v. *Din Doyal*[3]. *Ram Sukh Das* v. *Tota Ram*[4]. In the absence of personal liability on each side, it is just as much inequitable to set-off two mortgage decrees as to set-off a mortgage decree against a decree for money. R. 20 was newly inserted in 1908 and was intended to settle, as regards set-off, a conflict of decisions as to whether a mortgage decree was within the description of " decree for the payment of money " or " money decree." There is nothing in the language of the rule and nothing in reason to justify the interpretation that it only applies where both decrees are mortgage decrees. The general character of the two decrees concerned does not preclude the set-off.

16th December, 1936. Their Lordships' judgment was delivered by

Sir George Rankin.

SIR GEORGE RANKIN.—The question in this appeal is whether under rr. 18 and 20 of O. 21 in the First Schedule to the Civil Procedure Code, there can be a set-off in execution proceedings of two decrees hereunder mentioned. The High Court at Patna have allowed the set-off (6th February, 1933), after the Subordinate Judge of Godda had refused it (11th April, 1931).

The decrees in question are, first, a decree for mesne profits dated 15th January, 1924, of which the present appellants took an assignment on the 12th November, 1925; secondly, a final decree for sale dated 18th December, 1925. Both decrees were transferred to the Court of the Subordinate Judge at Godda for execution.

The history of the matter may be outlined as follows: One, Thakur Barham, was the proprietor of an estate in the Santal Perganas called Patsanda. He borrowed money from certain persons at whose instance in July, 1904, six annas interest in Patsanda was sold in execution of a decree and bought as to two annas by Srimoan, the father of the respondent Kedarnath, as to three annas by the husband of the respon-

1. (1932) 63 M.L.J. 722: I.L.R. 56 Mad. 339.
2. (1917) 15 A.L.J. 327.
3. (1883) I.L.R. 9 Cal. 479.
4. (1892) I.L.R. 14 All. 339.

P.C.

Hazariram Marwari v. Rai Bahadur Bansidhar Dhandhania.

Sir George Rankin.

dent Teji Bibi, and as to one anna by the respondent Nopechand and his brother Chaturi Ram, since deceased. The first and third of these purchases were made on behalf of the joint Hindu family of the auction purchaser and not on his individual account. Respondents 1 to 16 in this appeal to His Majesty represent all the persons on whose account these purchases were made. Unfortunately there were two six-anna shares in Patsanda belonging to Thakur Barham, one heavily mortgaged and the other comparatively free. The former was the interest which had been attached, but the sale certificate was granted in respect of the other, and the auction purchasers went into possession thereof. While so in possession they discharged two security bonds given on 10th November, 1902, by Thakur Barham, charging two annas and one anna respectively of Patsanda in favour of one Gobardhan Das. In 1913 the sale of July, 1904, was set aside as being invalid by reason that the interest sold was not the same as the interest attached. (Cf. *Thakur Barmha* v. *Jiban Ram Marwari*[1].) This gave rise to restitution proceedings under S. 144 of the Code which were carried up to this Board (*Jai Berham* v. *Kedar Nath Marwari*[2]), where in June, 1922, the auction purchasers were held entitled to set-off the amount of their deposit against the mesne profits, but the High Court at Patna were held to have been right in refusing their claim to set-off the sums paid in discharge of the bonds to Gobardhan Das. After some further litigation the matter was settled by the first of the two decrees now in question—namely, the compromise decree of 15th January, 1924, of which the appellants are assignees. That decree, while binding upon the present respondents No. 1 to 16 so far as regards recovery of 5½ annas share of Patsanda, is nevertheless, so far as mesne profits are concerned, against three only—namely, Kedarnath, Teji Bibi and Nopechand, who are specially described in the cause title as the auction purchasers. The sums decreed amount to Rs. 81,398.

Against this decree for mesne profits the High Court have set-off a decree which has resulted from a suit [No. 2 of 1917] brought by members of the families interested in the auction purchase of July, 1904, to recover from the representatives of Thakur Barham and from the interest in Patsanda

---

1. (1913) 26 M.L.J. 89: L.R. 41 I.A. 38: I.L.R. 41 Cal. 590 (P.C.).
2. (1922) 44 M.L.J. 735: L.R. 49 I.A. 351: I.L.R. 2 Pat. 10 (P.C.).

P.C.

Hazariram Marwari v. Rai Bahadur Bansidhar Dhandhania.

Sir George Rankin.

charged to Gobardhan Das, the sums expended in discharging the two bonds of 10th November, 1902. By his judgment dated 28th February, 1925, the learned Additional Subordinate Judge of Bhaghalpur found for the plaintiffs, holding that they had both a right to reimbursement and a charge upon the property, neither right being barred by the Limitation Act. The formal decree of 28th February, 1925, is not before their Lordships, but the final decree dated 18th December, 1925, directs a sum exceeding Rs. 86,000 to be realised by sale of the property charged, and this is the decree which has been set off. Respondents 1 to 16 represent all the holders of this decree.

In the High Court of Patna the view taken by Noor, J., who gave the judgment (the learned Chief Justice concurring), may be summarised by saying that the two decrees relate to the same transaction and that "the judgment-debtors of the one are in substance exactly the decree-holders of the other and *vice versa*" because all the present respondents No. 1 to 16 were in substance and as between themselves auction purchasers whose possession was ultimately set aside. He rejected the contention that r. 20 of O. 21 applies only when both decrees are mortgage decrees, but considered that a mortgage decree could only be set-off in cases where a personal obligation to repay existed and a remedy by personal decree was still available. He held on the facts that the remedy by personal decree was not in this case barred.

The contention that r. 20 only applies where both decrees are mortgage decrees was repeated before this Board, but their Lordships agree with the High Court in rejecting it. R. 20 was new in 1908 and was intended to settle, as regards set-off, a conflict of decisions as to whether a mortgage decree was within the description of "decree for the payment of money" or "money decree." There is nothing in the language of the rule and nothing in the reason of the matter to justify the interpretation contended for. In the absence of personal liability on each side, to set-off two mortgage decrees may be just as much or as little inequitable as to set-off a mortgage decree against a decree for money.

The words of r. 20—"decrees for sale in enforcement of a mortgage or charge"—cannot be restricted to personal judgments such as may be given under O. 34, r. 6.

P.C.

Hazariram Marwari v. Rai Bahadur Bansidhar Dhandhania.

Sir George Rankin.

As it was held by the judgment in the suit in which the final decree for sale was passed that the right of the present respondents 1 to 16 to a personal judgment subsisted and was not barred, their Lordships do not find it necessary either to examine this question afresh in these execution proceedings, or to embark upon a discussion of the difficulties that may arise if a mortgage decree be set-off against a money decree in the absence of any personal liability on the part of the mortgagor who holds the money decree. Mr. Dunne for the respondents contested the view taken in the High Court as to personal liability being a condition of set-off, but as this important question does not here arise for decision and calls for careful discussion, their Lordships do not think fit to pronounce upon it. In so saying they do not intend to prejudice the view taken by the High Court. On the contrary they would be slow to give effect to a rule of set-off so as to alter substantive rights or to produce consequences beyond the scope of an intention to avoid circuity of proceedings. Whenever the matter arises for decision the observations of the learned Judge (Noor, J.) and his discussion of the authorities (*Nagar Mal* v. *Ram Chand*[1], *Sheo Shankar* v. *Chunni Lal*[2], *Burma Oil Company* v. *Ma Tin*[3]. Also cf. *Venkata Reddi* v. *T. V. Dorasami Pillai*[4]) will afford assistance to the Board and to the Courts in India.

The general character of the two decrees concerned does not in their Lordships' view preclude the set-off, but it is necessary to examine their exact form, having regard to the terms of r. 18 of O. 21. The appellants' decree so far as money is concerned is against three only of the respondents—namely, Kedarnath, Teji Bibi and Nopechand. The respondents' decree is in favour of some 18 members of the same family or families. Moreover the respondents' decree is against certain persons called Mandal, purchasers from the representatives of Thakur Barham, as well as against these representatives themselves.

The presence of the Mandals as judgment-debtors in the respondents' decree raises no obstacle to set-off and the contrary was not contended by learned counsel for the appellants. The respondents were entitled to execute the decree for the

1. (1910) I.L.R. 33 All. 240.
2. (1916) I.L.R. 38 All. 669.
3. (1929) I.L.R. 7 Rang. 505.
4. (1932) 63 M.L.J. 722: I.L.R. 56 Mad. 339.

P.C.

Hazariram Marwari v. Rai Bahadur Bansidhar Dhandhania.

Sir George Rankin.

whole amount as against the Barham judgment-debtors, and cl. 4 of r. 18 with its illustration (*d*) embodies what has always been the law on this matter (cf. *Hury Doyal* v. *Din Doyal*[1] and *Ram Sukh Das* v. *Tota Ram*[2]).

The presence among the holders of the decree for sale in addition to Kedarnath, Teji Bibi, and Nopechand, of other members of their families, affords the only remaining objection to set-off. If *X* has a decree against *A*, and *A* and *B* have a decree against *X*, it is clear from illustration (*b*) to r. 18, as well as on principle, that *X* cannot insist on a set-off. Their Lordships will assume without deciding, that the rights of *B* make it equally impossible for *A* alone to claim set-off against *X*. But if *B* and *A* both ask for the set-off must it necessarily be refused? And even if it appears that *A* incurred the debt to *X* on behalf of himself and *B*? Their Lordships think not. It is true, that under rr. 18 to 20 the set-off of decrees is not a discretionary matter depending upon equitable considerations such as may emerge from the circumstance that both decrees arise out of the same transaction. Whatever they arise from, circuity of proceedings thereunder can be avoided and should be avoided—this is the principle of the rules. But if an assignee can insist upon set-off as provided by cl. 2 of r. 18, then to refuse the application of *A* and *B* to have the set-off allowed, would be the height of technicality. There is here no question of any other judgment-debt which could obstruct the set-off. *B* at his own request can be treated as having released his right to *A* if he comes before the executing Court and asks for this. The circumstance that in so doing he does no more than his duty as between himself and *A* may under these rules be irrelevant, but it adds an element of reason to his request.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitors for Appellants: *W. W. Box & Co.*

Solicitors for Respondents: *Hy. S. L. Polak & Co.*

S. P. K.

B. V. V. *Appeal dismissed.*

---

1. (1883) I.L.R. 9 Cal. 479. 2. (1892) I.L.R. 14 All. 339.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING.

N.A.S.T. Chidambaram Chettiar .. *Appellant** (*Plaintiff*)

v.

Venkatasubba Naik .. *Respondent* (*Defendant*).

Chidambaram Chettiar *v.* Venkatasubba Naik.

Limitation Act (IX of 1908), Ss. 4 and 19—Period prescribed in S. 19—Meaning of—If takes in additional period under S. 4—Endorsement of payment after period of limitation but within period extended by S. 4—If saves limitation.

The period prescribed in S. 19 of the Limitation Act does not include the extension which is given by S. 4 for filing a suit; S. 4 itself can come into operation only after the period of limitation prescribed has already expired, and S. 19 requires the acknowledgment to be made before the period prescribed has expired.

Therefore where the three years period of limitation for a promissory note expired during the time when the Court was closed, an acknowledgment or endorsement made after that date but before the re-opening of the Court will not serve as a fresh starting point of limitation.

Abdul Ghani v. *Chiranji Lal,* (1927) I.L.R. 49 All. 726, not approved.

Appeal against the decree of the Additional Subordinate Judge of the Court of the Subordinate Judge of Ramnad at Madura in Appeal Suit No. 72 of 1932 preferred against the decree of the Court of the District Munsiff of Sathur in O. S. No. 660 of 1929.

The following facts are taken from the judgments of the lower Courts and set out here to give a fuller idea as to how the question arose:—

The suit promissory note was executed on 12th June, 1923, by the defendant in favour of the plaintiff for Rs. 2,197-1-9 payable with interest at 15 per cent. per annum. On 22nd June, 1923, the defendant made a payment of Rs. 597-1-9 for principal and interest. On 27th June, 1926, he paid Rs. 100 towards the interest and endorsed the payment on the note. On 7th August, 1926, he made another payment of Rs. 500 and as no further payments were made, this suit was filed on 6th August, 1929. The three years period from the date of the first payment, *viz.*, 22nd June, 1923, expired on 22nd June, 1926, when the Court was closed for summer recess, it having re-opened only on the 28th June. It was contended that the endorsement of Rs. 100 made on 27th June, 1926, *i.e.*, when there was yet time to file a suit, saved limitation, though the endorsement was made more than three years after the last payment. Both the lower Courts held that the suit was barred and hence this second appeal.

---

* S. A. No. 119 of 1933. 19th November, 1936.

Chidambaram Chettiar *v.* Venkatasubba Naik.

A. S. Srinivasa Ayyar for Appellant.

K. V. Sesha Aiyangar and *K. Aravamuda Aiyangar* for Respondent.

The Court delivered the following

JUDGMENT.—The question raised in this second appeal is one of limitation. The suit promissory note was executed on the 12th June, 1923. There was an acknowledgment on the 22nd June, 1923 and a second acknowledgment on the 27th June, 1926. On that date the Court in which the suit should have been filed was closed. It was closed on the 22nd June and re-opened on the 28th June, 1926. The suit was filed on the 6th August, 1929. Both the Courts below have held that the suit was barred by limitation.

The argument in appeal is that S. 19 which is the section of the Limitation Act which has to be applied in this case, deals with the period prescribed by the Act as a whole for the filing of a suit and that when the Act as a whole is read, that period will be seen to expire not on the 22nd June, 1926, but only on the 28th June, 1926, when the Court re-opened and therefore three years can be calculated afresh from the 28th June, 1926. In other words, to put the argument very succinctly, it is this, that under S. 19 the period prescribed is to be calculated not only from all the articles and other sections of the Limitation Act but also by including the extension which is given by S. 4. It seems to me that this argument is untenable and obviously appears to be untenable from a mere perusal of the sections concerned. S. 4 runs thus: "Where the period of limitation prescribed for any suit, appeal or application expires on a day when the Court is closed, the suit, appeal or application may be instituted, preferred or made on the day that the Court re-opens". S. 19 reads as follows, omitting unnecessary words: Where, before the expiration of the period prescribed for a suit or application in respect of any property or right, an acknowledgment of liability has been made in writing, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed. It will be clear from S. 19 that it is necessary that the acknowledgment should be signed before the expiration of the period prescribed. It is equally clear from S. 4 that that section itself can come into operation only after the period of limitation prescribed has already expired. In this case therefore the period of limitation prescribed expired on the 22nd June, 1926, but by reason

Chidambaram Chettiar v. Venkatasubba Naik.

of the provisions of S. 4 a special right was given to the plaintiff to file his suit on a later date when the Court re-opened. It is impossible in my opinion to give a different meaning to the expression "expiration of the period prescribed" in S. 19 from the meaning which that expression bears in S. 4. True that I have been referred to one case in Allahabad decided by a single Judge in which upon facts similar to the present it has been held that S. 19 can also include the period extended by S. 4 (*Abdul Ghani* v. *Chiranji Lal*[1]), but the weight of authority is decidedly on the other side. There is a Bench decision by the Bombay High Court reported in *Bai Hemkore* v. *Masamalli*[2]; there is a decision of the learned Chief Justice of the Calcutta High Court in *Debendra Nath Roy* v. *Kartic Prasad Das*[3] and finally there is this very significant sentence in the judgment of the Privy Council reported in *Maqbul Ahmad* v. *Pratap Narain Singh*[4]. Their Lordships of the Privy Council are there discussing the meaning of S. 4 and what they say is this:

> "What the section provides is that where the period prescribed expires on a day when the Court is closed, notwithstanding that fact an application may be made on the day when the Court re-opens, so that there is nothing in that section which alters the length of a prescribed period".

If that is so, the prescribed period as I have already said, clearly expired by the 22nd June, 1926, and the endorsement which was made only on the 27th June, 1926, cannot possibly come within the provisions of S. 19.

In the result, the appeal fails and is dismissed with costs. Leave to appeal is refused.

S.V.V. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE MADHAVAN NAIR.

Marudamuthu Kadurar .. *Petitioner** (*Third Petitioner*)

v.

Minor Arumugasami Kadurar and another .. *Respondents* (*Respondents*).

Marudamuthu v. Arumugasami.

Civil Procedure Code (V of 1908), O. 21, r. 89—Court auction of properties belonging to judgment-debtor—Purchase and deposit of money into Court by the purchasers—Confirmation of sale pending—Private sale of some of the auctioned plots by the judgment-debtor to the same purchasers—Application by judgment-debtor praying to appropriate amount deposited to

1. (1927) I.L.R. 49 All. 726.
2. (1902) I.L.R. 26 Bom. 782.
3. (1928) I.L.R. 55 Cal. 1210.
4. (1935) 68 M.L.J. 665: L.R. 62 I.A. 80: I.L.R. 57 All. 242 at 248 (P.C.).

*C.R.P. No. 1039 of 1935. 12th November, 1936.

Marudamuthu *v.* Arumugasami.

decree and set aside Court sale under O. 21, r. 89—Whether can be allowed in the circumstances.

In execution of a decree in which the petitioner herein was the only defendant four items of property belonging to him were ordered to be sold. Lot 1 was purchased and the money was deposited by the purchaser in Court. The third item was sold to another purchaser who also deposited the money into Court. The fourth lot was purchased by the decree-holders. Pending confirmation of sale the judgment-debtor privately sold the plots Nos. 1 and 3 to the same purchasers and prayed that out of that sum, leaving something for poundage, the balance might be appropriated towards satisfaction of the decree. The amount he deposited under the circumstances would cover the total amount in the sale proclamation *plus* 5 per cent. on the sale of the lot 4 purchased by the decree-holder *plus* the poundage in respect of lot 4. Hence the judgment-debtor as well as the two purchasers in private sale from him petitioned to the Court to set aside the Court sale stating that they had complied with the provisions of O. 21, r. 89, Civil Procedure Code. It was argued by the judgment-debtor-petitioner that, inasmuch as the two purchasers had expressed their willingness that the money deposited by them in Court might be used by him as the properties had been privately sold to them, he had complied with the provisions of the Code. He was supported by the two purchasers in his contention.

Held, that the petitioner had not deposited in Court the amount necessary for making the payments under cls. (*a*) and (*b*) of O. 21, r. 89 and therefore the sale could not be set aside.

If the money deposited by the purchasers in Court for the lots they purchased could be used by the judgment-debtor then no doubt the sale would be set aside. The question is, can it be said in the circumstances of the case that the person seeking to set aside the sale has deposited the necessary sum in Court? If in the present case the amount deposited by the purchasers after the deposit, be said to be money which they can deal with as they liked, then the argument that taking that amount also into consideration the petitioner has deposited in Court sufficient amount to make the payments, may be accepted. After making the deposit, the money deposited by the purchasers is in the custody of the Court till final orders are passed by it with respect to the sale. If the sale is confirmed the purchasers get the property and the money can no longer be claimed by them. If on the other hand it is set aside, they will be refunded the money and it becomes theirs. But they cannot while the money is kept in the custody of the Court operate upon it to enable the person wanting to set aside the sale to use it for the purpose of depositing it in Court within the meaning of O. 21, r. 89.

C.M.A. No. 82 of 1911, distinguished.

Petition under S. 115 of Act V of 1908 and S. 107 of the Government of India Act, praying the High Court to revise the order of the District Court of Trichinopoly dated the 13th day of August 1935 and made in C.M.A. No. 40 of 1935 (E.A. No. 882 of 1934 in O.S. No. 109 of 1927 Sub-Court, Trichinopoly).

K. Rajah Aiyar and *L. A. Gopalakrishna Aiyar* for Petitioner.

S. Parthasarathy and *V. K. Thiruvenkata Chari* for Respondents.

The Court delivered the following

JUDGMENT.—This Civil Revision Petition arises out of an application made under O. 21, R. 89, Civil Procedure Code, to set aside a court sale. The application was made by three petitioners, of whom the petitioner was the third petitioner before the Subordinate Judge. The other two petitioners were the purchasers of two lots of the property sold, namely, lots 1 and 3.

The facts are briefly these. In execution of the decree in O.S. No. 109 of 1927 in which the petitioner was the only defendant, four items of property were ordered to be sold. The first petitioner in the lower Court purchased the first lot for Rs. 1,000 which was deposited by him. Lot 2 was not sold. The second petitioner purchased the third lot for Rs. 800. He also deposited the money into Court. Lot 4 was purchased for Rs. 1,005 by the decree-holders who were minors represented by their next friend. Pending confirmation of the sale the 3rd petitioner (that is, the judgment-debtor-petitioner) privately sold lot 1 to the first petitioner for a sum of Rs. 1,200. He wanted that a sum of Rs. 957-13-0 out of this amount may be appropriated towards the decree amount, the balance being the poundage of Rs. 42-3-0. Lot 3 properties were sold by the judgment-debtor privately to the second petitioner for Rs. 1,000. He prayed that out of that sum Rs. 764-1-0 may be appropriated towards the satisfaction of the decree, the balance of Rs. 35-15-0 representing poundage. The third petitioner, the appellant, has deposited in Court Rs. 369-8-0. Thus the total amount available is Rs. 957-13-0 *plus* 764-1-0 *plus* 369-8-6, in all Rs. 2,091-6-6. This amount will cover the amount mentioned in the sale proclamation, that is, Rs.1,998-14-6 *plus* 5 per cent. on the sale price of lot 4 purchased by the decree-holders *plus* the poundage in respect of the sale of lot 4. In these circumstances the three petitioners ask the Court to set aside the sale stating that they have complied with the provisions of O. 21, r. 89, Civil Procedure Code, the relevant portions of which are as follows:—

"(1) Where immovable property has been sold in execution of a decree, any person, either owning such property or holding any interest therein by virtue of a title acquired before such sale, may apply to have the sale set aside on his depositing in Court, (*a*) for payment to the purchaser, a sum equal to five per cent. of the purchase money, and (*b*) for payment to the decree-holder, the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, *less* any amount which may, since

the date of such proclamation of sale, have been received by the decree-holder".

It will be observed that of the three petitioners, petitioners 1 and 2 are themselves purchasers of two items of the property and are hence incompetent to maintain an application under O. 21, r. 89. But the judgment-debtor being one of the petitioners entitled to apply under O. 21, r. 89, the question whether the sale can be set aside in the above circumstances has to be considered; and, as already stated, he is the only petitioner before this Court.

The learned Subordinate Judge set aside the Court sale, but his order was set aside by the learned District Judge.

The question of law presented by this case is a novel one and has not been the subject-matter of decision in any court. It is argued by the petitioner that, inasmuch as the two purchasers have expressed their willingness that the money deposited by them in Court, may be used by him as the properties have been privately sold to them, he has complied with the provisions of O. 21, r. 89, Civil Procedure Code, by depositing in Court the necessary funds and the sale should therefore be set aside. He is supported in his application by the two other purchasers. It appears to me that the contention of the petitioner cannot be accepted. If the money deposited by the purchasers of lots 1 and 3 can be used by the appellant, then no doubt the sale should be set aside. The question is, can it be said in the circumstances of the present case that the appellant has deposited in Court the necessary sum? It is argued that since the purchasers of lots 1 and 3 have expressed their willingness that the money deposited by them may be used by the petitioner, that money has become his for depositing in Court and that he has therefore deposited into Court the necessary amount. In support of this contention an unreported decision of this Court in C.M.A. No. 82 of 1911 has been brought to my notice, but that case is distinguishable from the present one inasmuch as the amount in Court standing to the credit of the coparceners which they allowed the 5th defendant, the petitioner, to use for setting aside the sale was their own money, that is money lying to their credit, and therefore it may well be said that it became the money of the petitioner for him to deposit in Court within the meaning of O. 21, r. 89, Civil Procedure Code, when they expressed their consent to that course. If in the present

Marudamuthu v. Arumugasami.

case the amount deposited by the petitioners 1 and 2 can, after the deposit, be said to be money which they can deal with as they liked, then the argument that taking that amount also into consideration the petitioner has deposited in Court sufficient amount to make the payments, may be accepted. It seems to me that after making the deposit the money deposited by the purchasers is in the custody of the Court till final orders are passed by it with respect to the sale. If the sale is confirmed the purchasers get the property and the money can no longer be claimed by them. If on the other hand it is set aside they will be refunded the money and it becomes theirs. But they cannot while the money is kept in the custody of the Court operate upon it to enable the person wanting to set aside the sale to use it for the purpose of depositing in Court within the meaning of O. 21, r. 89. In the circumstances of the present case I am not satisfied that the petitioner has deposited in Court the amount necessary for making the payments under cls. (*a*) and (*b*) of O. 21, r. 89, Civil Procedure Code. In my opinion the order of the lower Court is right and the Civil Revision Petition is dismissed with costs.

K.C. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VARADACHARIAR.

Pavani Subbamma (deceased) Pavani Gurumurthy L.R. of 1st Appellant (deceased) *vide* Order dated 17th October 1935 in C.M.P. No. 4125 of 1935 .. *Appellants** (*Plaintiff and Nil*)

v.

Anumala Rama Naidu (deceased) Mungamoor Venkatakrishna Rao and another .. *Respondents* (*Defendants and Nil*).

Pavani Subbamma v. Anumala Rama Naidu

Will—Testator providing for a gift over to grandchildren after widow's enjoyment of properties—Express provisions of sale, gift, etc., in favour of grandchildren—Widow alienating property for the sake of debts binding upon estate—The nature of the estate enjoyed by the widow—Limited interest—Analogy of woman's estate in Hindu Law whether existing—Alienation whether binding on the grand children.

One *V* left a will at his death disposing of his properties, by which his widow *S* should enjoy the properties and after her lifetime the properties

* S.A. No. 1349 of 1932. 19th November, 1936.

Pavani Subbamma v. Anumala Rama Naidu

should be taken in the ratio of 3 to 5 by the son's daughter and the daughter's son respectively, as the two were the only surviving grandchildren of the testator. The present suit was instituted by the son's daughter for recovery of possession of her share in one item of property forming part of *V's* estate which had been sold by *S* to the first defendant. The plaintiff's husband, who had been examined, admitted that since *V's* death he had been living with *S* and looking after many of the transactions entered into by her with his knowledge and the knowledge of the second defendant and that the documents executed by her were attested by these two people. The sale in favour of the first defendant was effected for discharging debts which arose mainly out of a suit instituted by Government against *S* and her co-sharer under the Madras Railway Protection Act. The questions which arose for decision were (1) whether *S* was at all entitled to sell anything more than her life interest even for purposes of meeting a necessity binding upon the estate and (2) whether the liability under the Railway Protection Act was only a personal liability of *S* or was one for which not merely her life interest but the property itself including the interest of reversioners if any, could be sold.

Held, (1) that since in the will the gift over to the grandchildren was of the entire properties and not a mere gift by way of defeasance, it should be held that it indicated that the prior gift in favour of the widow was only of a limited interest. Moreover the provision in the will giving express powers to the grandchildren of gift, sale, etc., undoubtedly would indicate the intention of the testator to draw a distinction between the powers of the widow and those by the grandchildren. Hence *S* took only a limited interest.

Judgment in A. S. No. 232 of 1929 [67 M.L.J. (S.N.) p. 69] referred to and relied on.

(2) That in deference to the view taken in *Maharaja of Kolhapur* v. *Sundaram Aiyar*, (1924) I.L.R. 48 Mad. 1 at 125 to 129 that it is possible to create an interest analogous to a woman's estate in Hindu law notwithstanding the addition by a gift over like the one in the will here, the estate taken by *S* need not necessarily be only a life estate in the English law sense of the term.

(3) That from an inference of the facts, the lower Courts' decision was correct in that they came to the conclusion that there was necessity binding upon the estate which justified the alienation. Therefore there was no reason to differ from the lower Courts merely on the ground that *prima facie* the onus lay upon the alienee.

Appeal against the decree of the Court of the Subordinate Judge of Nellore in A. S. No. 229 of 1930 (A. S. No. 162 of 1930, District Court, Nellore) preferred against the decree of the Court of the District Munsif of Kavali in O. S. No. 265 of 1928.

M. Patanjali Sastri for Appellants.

B. Somayya and *D. Narasaraju* for Respondents.

The Court delivered the following

JUDGMENT.—This case raises questions of some difficulty, but, having given the matter my best consideration, I have come to the conclusion, though not without hesitation, that there is no sufficient reason for my interfering with the concurrent decisions of the Courts below.

The suit property formed part of the estate of one Venkatramanayya who died in 1904, leaving a will—Ex. A. At his death he left surviving his widow Savitramma and two grandchildren, namely, a daughter's son (the second defendant) and a son's daughter (the plaintiff). The will accordingly provided that the widow should enjoy the properties and after her lifetime they would be taken in the ratio of 3 to 5 by the son's daughter and the daughter's son respectively. The present suit was instituted by the son's daughter for recovery of possession of her share in one item of property forming part of Venkatramanayya's estate which had been sold by Savitramma to the first defendant in 1917.

The plaintiff's husband, who has been examined as P.W. 1, admits that since Venkatramanayya's death, he has been living with Savitramma and looking after her affairs. It also appears from his evidence that many of the transactions entered into by Savitramma were entered into by her with his knowledge and the knowledge of the second defendant and that the documents executed by her were attested by these two people. The Court may therefore fairly presume that there was very little likelihood of Savitramma doing any acts prejudicial to those who are to take the property after her. The sale in favour of the first defendant was effected for discharging debts which arose mainly out of a suit instituted by the Government against Savitramma and her co-sharer under the Madras Railway Protection Act. A tank, which it was their duty to repair, was in disrepair and as a notice given to the co-sharers under the provisions of the Act to make the necessary repairs was not complied with, the Government executed the repairs and instituted a suit in 1912 for recovery of the money spent. It is unnecessary to refer to the steps taken in execution of the decree obtained in that suit and to the steps taken by the widow to meet that liability. It is sufficient to say that both the courts have concurrently found that the suit sale became necessary for the purpose of meeting the liability resulting from that suit.

Two questions have to be considered in deciding whether the sale thus effected will be binding upon the plaintiff, namely, (1) whether Savitramma was at all entitled to sell anything more than her life interest even for purposes of meeting a necessity binding upon the estate, and secondly, whether the

liability under the Railway Protection Act, was only a personal liability of Savitramma or was one for which not merely her life interest but the property itself including the interest of the reversioners, if any, could be sold. The answer to the first question depends upon the true construction of the will Ex. A.

Mr. Somayya, who appeared for the alienee, went so far as to contend that Ex. A confers a *stridhanam* or an absolute estate upon Savitramma. He relied in support of that argument, upon the use of the word 'Hakdar' and upon the statement that Savitramma should enjoy the property in the way that the testator himself had been doing. But as against this, it has to be pointed out that the will contains a gift over in favour of his grandchildren at his death and the gift over is said to be of the *entire* properties. It will be very doubtful, if the first gift in favour of Savitramma is to be held to be an absolute estate, whether a gift over in these terms would be valid at all. To avoid such a possibility, the proper rule of construction has been held to be to take the will as a whole; and the presence of a gift over, which is not a mere gift by way of defeasance, has generally been held to be an indication that the prior gift was only of a limited interest. There is another circumstance in the present case which points strongly in favour of interpreting the gift to Savitramma as a limited gift, namely, the express provision made at the end of the will that the grandchildren shall have powers of gift, sale, etc. This clause undoubtedly indicates that the testator intended to draw a distinction between the powers of the widow and the powers of the grandchildren. In A. S. No. 232 of 1929 [67 M. L. J. (Short notes) p. 69] a Division Bench, dealing with a similar will, held, in favour of the limited construction of the prior gift. The language there was stronger in favour of an absolute estate to the widow because the dispositive clause contained words conferring wide powers of disposition on her, but in view of the gift over and the reference in the context to the discharge of debts, the learned Judges thought it right to limit the power of disposition to circumstances of necessity or the discharge of debts. I am accordingly of opinion that the courts below were right in holding that Savitramma took only a limited and not an absolute interest.

The further question arises whether the limited interest was one similar to the estate of a Hindu widow or only a strict

Pavani Subbamma v. Anumala Rama Naidu

life interest. The lower appellate court had not felt any difficulty in holding that, even if Savitramma's estate was only a life interest she would have had powers of alienating the *full* interest in the estate for necessary purposes. I am not by any means satisfied that the proposition can be so easily assumed. It is one thing to say that the purpose is a necessary or proper purpose but another thing to hold that an alienation will convey the full proprietary interest, regardless of the nature of the alienor's interest, for ordinarily, the alienor can convey only the interest to which he or she is entitled. It is true that under the Hindu Law a female, holding what is known as the woman's estate, can alienate the estate for proper purposes but that has been held to be possible because her interest is not exactly the same as a life interest under the English Law.

Arguments have accordingly been advanced before me as to whether taking Savitramma's interest under Ex. A to be a 'limited' interest, it is only a life interest in the English law sense or it resembles a woman's estate under the Hindu Law. In favour of the theory of the 'limited' estate of a female heir, there is the consideration that a Hindu testator may reasonably be presumed to create an estate known to the Hindu Law rather than a strict life interest as understood in the English law, but the former view would make the gift over in favour of the grandchildren a *contingent* one.

There are two decisions of the Privy Council in *Mahomed Shamsul* v. *Shewukram*[1] and *Mussumat Bhagbutti Daee* v. *Chowdry Bholanath Thakoor*[2] and I am free to confess that it is not easy to reconcile their Lordships' observations in these two judgments. Mr. Somayya relied on a judgment of this Court in *Ratna Chetti* v. *Narayanaswami Chettiar*[3]. I have always had some difficulty in understanding this judgment because the learned Judges assume the possibility of a *vested* remainder subsisting side by side with a limited interest analogous to a Hindu woman's estate. In *Maharaja of Kolhapur* v. *Sundaram Aiyar*[4] the two decisions in *Mahomed Shamsul* v. *Shewukram*[1] and *Mussumat Bhagbutti Daee* v. *Chowdry Bholanath Thakoor*[2] as well as a Full Bench judgment of the Patna High Court have been referred to at some length by

---

1. (1874) L.R. 2 I.A. 7. 2. (1875) L.R. 2 I.A. 256.
3. (1914) 26 M.L.J. 616.
4. (1924) I.L.R. 48 Mad. 1 at 125 to 129.

Pavani Subbamma v. Anumala Rama Naidu

Kumarasami Sastriar, J. and the learned Judge holds that it is possible to create by a document an interest analogous to a Hindu woman's estate and tack on to it a remainder, though he does not go the length of stating that such a remainder will be a 'vested' remainder. In deference to the view of the learned Judges who have considered that it is possible to create an interest analogous to a woman's estate notwithstanding the addition of a gift over like that in Ex. A, I am not prepared to say that the estate taken by Savitramma under Ex. A must necessarily be taken to be only a life estate.

On the assumption, then, that Savitramma took an estate analogous to a woman's estate under the Hindu Law, the next question for decision is whether the alienation in favour of the 1st defendant was one justified by legal necessity. I am not very much impressed by the argument that there is a concurrent finding by the courts below on this point because some of the aspects placed before me by Mr. Patanjali Sastri on behalf of the appellant have not been adverted to in those judgments. But so far as inferences of fact have been drawn by the lower appellate court, I see no reason to differ from them. As I understand it, the position taken by Mr. Patanjali Sastri is that the liability to make the repairs or to pay the cost thereof in cases arising under the Railway Protection Act* was the personal liability of Savitramma and that therefore only her interest could have been sold even in execution of that decree and accordingly there is no reason for holding that any larger interest passed under the sale by her to the first defendant. Even assuming that contention to be correct in cases where the disrepair had been due to the default of Savitramma, it will be scarcely correct to postulate the same position of the disrepair had arisen even during her husband's lifetime. Unfortunately, there is no definite information on this point, though Mr. Somayya relied with some justification on the fact that the notice by the Government was issued in December, 1906, that is, within a couple of years after Venkatramanayya's death; and he argued that having regard to the amount that was actually spent by the Government on the repairs, it could hardly have been the case that such repairs became necessary merely by reason of any neglect on the part of Savitramma after Venkatramanayya's death. It

* Madras Act IV of 1886.

Pavani Subbamma v. Anumala Rama Naidu

is true that to a great extent the onus in a case of this kind will lie upon the alienee but, as I have already stated, the management of the lady's affairs has been mainly in the hands of P. W. 1 and the lady has entered into most of her transactions only with the knowledge and consent of P. W. 1 and the second defendant. The suit itself was instituted only after the lapse of 10 years after the lady's death. The evidence of P. W. 1 also shows that the estate of Venkatramanayya was heavily encumbered even during his lifetime and that further encumbrances had to be made by Savitramma. The lower appellate Court definitely states that it was scarcely likely that the income available to her would have made it possible for her to make the repairs out of her current income. In the light of these facts, I do not feel justified in differing from the conclusion of the Courts below merely on the ground that *prima facie* the onus lay upon the alienee. I accordingly confirm the decree of the Courts below and dismiss the second appeal with costs.

Leave to appeal is granted.

K. C. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW AND MR. JUSTICE VENKATARAMANA RAO.

T. S. Ramaswami Aiyangar, Property guardian and manager of the estate of Lunatic Thenammal in O. P. No. 57 of 1925 on the file of the District Court, Salem .. *Accused* in Calendar Case No. 104 of 1935 on the file of the Second Class Magistrate of Virudhunagar*

v.

The Sivakasi Municipality through its Chairman at Sivakasi .. *Respondent (Complainant).*

Ramaswami Aiyangar v. Sivakasi Municipality.

Madras District Municipalities Act (V of 1920)—Non-payment of profession tax—Prosecution for under r. 30, cl. 2, Sch. 4—Accused if can plead non-liability in defence—Prosecution to prove liability to tax.

* Crl. R. C. No. 185 of 1936. Case Ref. No. 15 of 1936. 5th November, 1936.

Ramaswami Aiyangar *v.* Sivakasi Municipality.

Where a Municipality called on the guardian and manager of the estate of a lunatic to submit a return showing the income for profession tax levy, but he submitted a return stating that he was not liable to pay profession tax for certain reasons, which the Municipal Council however overruled, and launched a prosecution for non-payment of profession tax, it is incumbent upon the prosecution to establish affirmatively that the profession tax was legally leviable from the accused; and it is also open to the accused to plead and prove, notwithstanding the Council's decision against him, that he is not liable to pay the tax and therefore is not liable to be prosecuted under r. 30, cl. (2) of Sch. 4 of the District Municipalities Act.

Case referred for the orders of the High Court, under S. 438 of the Criminal Procedure Code, by the Sessions Judge of Ramnad Division at Madura in his letter dated 21st February, 1936 in Crl. R.P. No. 26 of 1935 against C.A. No. 25 of 1935, Joint Magistrate, Sivakasi (C.C. No. 104 of 1935, Sub-Magistrate, Virudhunagar).

Parakat Govinda Menon for *The Public Prosecutor* (*L. H. Bewes*) on behalf of the Crown.

B. Sitarama Rao and *K. P. Ramakrishna Aiyar* for Respondents.

The judgment of the Court was delivered by

Venkataramana Rao, J.

Venkataramana Rao, J.—This Criminal Revision Case arises out of a reference made by the Sessions Judge of Ramnad in regard to a prosecution for non-payment of profession tax under the District Municipalities Act V of 1920. One Mr. T. S. Ramaswamy Aiyangar was prosecuted as the property guardian and manager of the estate of a lunatic Thenammal for non-payment of an alleged profession tax under r. 30, cl. 2 of Sch. 4 of the District Municipalities Act.

The case for the prosecution is that the said lunatic Thenammal was residing within the limits of the Sivakasi Municipality, that profession tax was payable in respect of the income alleged to have been received by her and T. S. Ramaswami Aiyangar who is representing her estate ought to pay the said tax. Under r. 19 (1) he was asked to submit a return showing the income. He submitted a return stating that he was not liable to pay the profession tax on the ground that he was not residing within the local limits of the Municipality and even otherwise the property tax in respect of the estate has been paid and in any event profession tax could not be levied. But the Municipal Council overruled his objection and instituted this prosecution. He raised the same defence before the Sub-Magistrate of Virudhunagar but he overruled his

Ramaswami Aiyangar v. Sivakasi Municipality.

Venkataramana Rao, J.

defence and convicted him. This conviction was confirmed by the Joint Magistrate of Sivakasi. Revision was preferred against the said order to the Sessions Judge of Ramnad who was of opinion that it was open to him to raise the said defence, but however referred the matter to us under S. 438, Criminal Procedure Code. Two questions fall to be decided, namely, (1) whether it is open to the accused in a prosecution under r. 30, cl. 2 of Sch. 4 of the District Municipalities Act to plead that the tax is not leviable; and (2) whether it is not incumbent upon the prosecution to establish affirmatively that the tax is payable and the defaulter committed default in payment of the tax and an offence has been committed. Ordinarily where a person is prosecuted for any criminal offence it is incumbent upon the prosecution to affirmatively prove that an offence has been committed and if *prima facie* proof has been let in by the prosecution, it is open to the accused to plead and prove that he has not committed any offence. The fact that the prosecution has been launched under the provisions of a special Act would not displace this elementary rule unless there are provisions in the said Act to the contrary. So far as we have been able to see, there is nothing in the provisions of the District Municipalities Act which would relieve the prosecution of the onus of proving that an offence has been committed or negativing the right of the accused to plead that he has not committed any offence. Mr. Sitarama Rao has not been able to show us any provision excepting r. 28 of Sch. 4. So far as that rule is concerned, it only states that where an assessment has not been objected to or on objection the assessment has been confirmed, it is treated as final. But the said finality is only for the purpose of the Act and it has been held that the said finality would not prevent a person from impeaching the legality or validity of the assessment in a Civil Court. So far as the right of the Municipality to levy any tax is concerned, they must strictly conform to the provisions of the Act. If they do not do so, they have no right to enforce the tax. In fact S. 354 says that a charge can be validly imposed if the provisions of the Act are substantially complied with. If not there is no jurisdiction to levy it. The imposition of a tax on a person not taxable under the Act would be a substantial disregard of the provisions of the Act and in a suit for refund of the tax it is open to a person to prove that he is not taxable under the Act. We do not see why a different principle should apply in

Ramaswami Aiyangar *v.* Sivakasi Municipality.

Venkataramana Rao, J.

the case of a criminal prosecution and how a person can be convicted of a criminal offence for non-payment of a sum which he is not legally liable to pay. If Mr. Sitarama Rao's argument is to be pushed to its logical conclusion, it comes to this, that when once the Municipality imposes an assessment it becomes final; the assessee must pay the tax and then go to a Civil Court and in the meanwhile if he is prosecuted criminally he must undergo punishment even though ultimately the Civil Court may give him redress. It will be a sorry state of affairs if such were to be the state of the law. But there is nothing in the provisions of the District Municipalities Act to countenance such a proposition as is contended for by Mr. Sitarama Rao. There is clear authority for the view that we are now taking. In *Smith,* In re[1], Krishnan, J., in connection with a prosecution under S. 288 of the Madras City Municipal Act made the following observations:—

"There is finally an argument used by the Magistrate in support of his judgment, namely, that, as the accused did not go to the Standing Committee and seek redress before them, it should be taken as settled that the accused is bound to pay the tax imposed upon him, that it has become final under the law and that the Magistrate could not question its legality. I am unable to agree with this view because the accused is being prosecuted for an offence for non-payment of the license fee and he is entitled to say that he is not bound to pay it. There is no kind of estoppel in a criminal case as the Magistrate seems to think. The prosecution must establish affirmatively to his satisfaction that the tax was payable and that there was a default in payment of the tax. The fact that the accused did not appeal to the Standing Committee cannot be treated as in any way preventing him from raising the plea before the Criminal Court, where he is sought to be convicted of an offence by the prosecutor".

Devadoss, J., cited with approval the above observations of Krishnan, J., with reference to a prosecution under S. 338 of the *Chairman, Municipal Council, Chidambaram* v. *Tirunarayana Aiyangar*[2]:

"In order to sustain a conviction it must be shown that the accused violated a legal order which a public servant or a statutory body was authorised under the law to pass. . . . I have no hesitation in holding that, where an act is *ultra vires,* a statutory body, whether it be of the Chairman or of the whole council, the Court, which is asked to convict a person for the violation of the order of the statutory body, is not prevented from considering the legality of the order".

We may also observe that this is the view taken by Phillips and Madhavan Nair, JJ., in *Gopayya,* In re[3] and also by

1. (1923) 45 M.L.J. 731.
2. (1927) 55 M.L.J. 566: I.L.R. 51 Mad. 876 at 884
3. (1927) 55 M.L.J. 27: I.L.R. 51 Mad. 866.

Ramaswami Aiyangar *v.* Sivakasi Municipality. — Venkataramana Rao, J.

Waller and Krishnan Pandalai, JJ., in *Raheem Saheb, In re*[1], with reference to S. 221 of the Madras Local Boards Act. In our opinion this is the correct view. We are therefore clearly of the opinion that it is incumbent upon the prosecution to establish affirmatively that the profession tax was legally leviable from the accused and it is also open to the accused to plead and prove that he is not liable to pay the tax and therefore he is not liable to be prosecuted under r. 30, cl. 2 of Sch. 4 of the District Municipalities Act. But none of the Magistrates have gone into the matter on the merits. However having regard to the triviality of the amount involved in this case, we do not think this is a fit case for sending the case back for retrial. We therefore quash the conviction and the sentence, and acquit the accused.

Sentence and conviction quashed.

S. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VARADACHARIAR AND MR. JUSTICE MOCKETT.

Shanmukam *alias* Muthukaruppan, minor represented by his guardian Shanmukam Chettiar .. *Appellant* (2nd Defendant)*

v.

Nachu Ammal and another .. *Respondents (Plaintiff and 1st Defendant).*

Shanmukam *v.* Nachu Ammal.

Hindu Law—Debts—Father's power of disposition—Alienation for antecedent debts not illegal or immoral—Father not being manager of family—Son's share in property if bound—Mortgaged property described as self-acquisition of father—Son also joining in execution of deed—Effect—Right of creditor as against son's share of property.

Under the Hindu Law the son's share in the joint family property is at the disposal of the father to the extent necessary for discharge of the father's debts if they are not illegal or immoral. A distinction has in this connection been made between an involuntary sale of the father's property for the satisfaction of his debts and a voluntary disposition by him by introducing the limitation that in the latter case a debt must be antecedent to the transfer of the property and not contemporaneous with the transfer. But the power of the father cannot be further limited by restricting it to cases in which he also happens to be the managing member of the joint family. The power of disposition possessed by the father as such arises out of the relationship of father and son, while the power as manager arises out of his representative character in respect of the joint family.

---

1. (1929) 57 M.L.J. 317: I.L.R. 52 Mad. 714.

* Appeal No. 104 of 1934. 25th September, 1936.

Held, that a father has power to bind his son's share in the family property for an antecedent debt not illegal or immoral, even though the father is not the manager of the joint family because of the existence of his own father.

Case-law reviewed.

Rayulu Aiyar v. *Vairavan Chettiar*, (1936) M.W.N. 866, dissented from.

The mere description of certain property dealt with by the father as his self-acquisition does not conclude the question whether the son's interests if any in the property even on the assumption that it is joint family property would be bound by the transaction or not. The utmost that can be derived from the reference to the property as self-acquisition in the hypothecation deed executed by the father is that the father might have claimed it to be his self-acquisition; but where the creditor insists on the son also being expressly joined in the document, so that whatever interest the son might possess in the hypothecated properties might be bound by the transaction, it is not open to the father to contend that the properties were dealt with by him merely as his self-acquisition and that the creditor has no remedy against the son's interest in the properties.

Daulat Ram v. *Mehr Chand*, (1887) L.R. 14 I.A. 187: I.L.R. 15 Cal. 70 (P.C.), relied on.

Balwant Singh v. *R. Clancy*, (1912) 23 M.L.J. 18: L.R. 39 I.A. 109: I.L.R. 34 All. 296 (P.C.), considered.

Appeal against the decree of the Court of the Subordinate Judge (Principal) of Madura dated 25th September, 1933 and made in O. S. No. 139 of 1926.

K. S. Ramabhadra Aiyar and *P. Sridhara Rao* for Appellant.

S. T. Srinivasagopalachariar for Respondents.

The judgment of the Court was delivered by

Varadachariar, J.—This is an appeal by the second defendant against a decree for sale passed in a mortgagee's suit. The second defendant is the undivided minor son of the first defendant who executed the suit mortgage bond (Ex. A) on 24th May, 1924, securing repayment of a sum of Rs. 11,000 borrowed in the manner and for the purposes set forth in Ex. A. Besides the two defendants, it is stated that there are two other members in their joint family, namely, the father and the uncle of the first defendant. Varadachariar, J.

Ex. A purports to mortgage six items of properties which it would appear were all purchased in the name of the first defendant though he was only a junior member in the family. In respect of the first of these items, the document uses the following words "property which I purchased as self-acquisition under a sale deed dated 27th March, 1919, etc." In respect of other items, though a reference is made to the

fact of purchase in the first defendant's name the term self-acquisition is not used. The mortgage bond is executed by the first defendant for himself and as guardian of the second defendant.

The suit was instituted against the two defendants only; and, in the first instance, an *ex parte* decree was passed against them. In proceedings to set aside the *ex parte* decree, the result of an order passed by this Court on appeal was that it was set aside only as against the second defendant and the original decree stood as against the first defendant. At the second trial, the learned Subordinate Judge passed a mortgage decree in the ordinary form against the second defendant also and provided for liberty to apply for a personal decree in due course. It is against the decree passed on the second hearing that this appeal has been filed.

It may be convenient at the outset to dispose of an objection taken with reference to the frame of the suit and the allegations in the plaint. It was argued that if the plaintiff wanted relief on the footing that the mortgaged properties are joint family properties, he should have added the father and the uncle of the first defendant as parties to the suit and in their absence the plaintiff must be limited to a remedy on the footing that the hypothecated properties are the self-acquisitions of the first defendant and that therefore no decree should be passed even against the second defendant on the assumption of the hypothecated properties being joint family properties. We are unable to accept this contention as well founded. It may no doubt be open to the plaintiff to implead as parties to his suit persons who are not parties to the mortgage and seek to bind them by the mortgage. But that is very different from saying that if he does not implead such persons as parties to his suit, the omission disentitles him to a decree even as against persons impleaded. The only result of the omission will be to leave the question open as against the non-impleaded parties and this is the view which the lower Court has adopted in this case.

It was next contended on behalf of the appellant that the plaint is framed only on the footing that the hypothecated properties are the self-acquired properties of the first defendant and that therefore no mortgage decree ought to be passed as against the second defendant. Whatever criticism the plaint may be open to, it is clear, as the lower Court points out, that

by the time issues came to be framed in the case, the parties realised that the question of the second defendant's liability to be bound by the mortgage even on the assumption that the properties hypothecated were joint family properties was one of the matters to be tried in the suit; and issue 5 was accordingly framed in these terms. "Is the mortgage sued on true, valid and binding on the minor second defendant?" In this view the second defendant cannot claim to have been in any manner prejudiced by the form of the plaint; and, now that the question raised by the 5th issue has been fully tried, there is no reason for declining to grant the plaintiff such relief as he may be entitled to on the assumption that the hypothecated properties are joint family properties.

A cognate argument to the above was advanced in the following form, namely, that as Ex. A purports to describe the hypothecated properties or at least one of them as the self-acquisition of the first defendant, the Court, must, on the authority of the decision in *Balwant Singh* v. *R. Clancy*[1], hold that it was not intended by the first defendant to deal with the properties in any other character and accordingly only the first defendant's interests in the hypothecated properties can be held bound. The decision in *Balwant Singh* v. *R. Clancy*[1] has been considered in several decisions of this Court, where it has been pointed out, that the mere description of the property dealt with by the father as his self-acquisition does not conclude the question whether the son's interests if any in the property even on the assumption that it is joint family property would be bound by the transaction or not. In addition to these cases, we may refer to an earlier decision of the Privy Council in *Daulat Ram* v. *Mehr Chand*[2], where two members of a joint Hindu family purported to mortgage certain properties describing them as solely belonging to them. Their Lordships nevertheless held that the other members of the family would be bound by that mortgage and the execution sale following thereon, when it was clear from the document taken as a whole that their interests also were intended to be conveyed and it was also found that the purpose of the debt was one binding upon them. In the present case, any ambiguity arising from the use of the expression self-acquisition is removed by

1. (1912) 23 M.L.J. 18: L.R. 39 I.A. 109: I.L.R. 34 All. 296 (P.C.).
2. (1887) L.R. 14 I.A. 187: I.L.R. 15 Cal. 70 (P.C.).

Shanmukam v. Nachu Ammal.

Varadachariar, J.

the fact that the second defendant has been made a party to the document, represented by his father as guardian. The utmost that can be derived from the reference to the property as self-acquisition in the document is that the father might have claimed it to be his self-acquisition but as the creditor was not prepared to take any risk on that matter he insisted on the son also being expressly joined in the document, so that whatever interest the son might possess in the properties hypothecated even if they should be held to be joint family properties might be bound by the transaction. In this view there is no force in the objection raised on the strength of the decision of the Privy Council in *Balwant Singh* v. *R. Clancy*.[1]

The main argument however on behalf of the appellant was directed to the question raised by the 5th issue; and the appellant's learned counsel contended that as the first defendant was not the manager of the family because of his father's existence, the first defendant had no power to bind his son's share in the family property by a mortgage, even though it be to secure repayment of the first defendant's antecedent debts. In support of the contention, he relied on a decision of a Bench of this Court in Appeals Nos. 406 and 407 of 1930, *Rayalu Aiyar* v. *Vairavan Chettiar*[2]. That judgment, given on a similar document executed by the first defendant in this case, certainly supports the appellant's contention but having given the matter our most respectful attention and consideration we regret we are unable to take the same view. It may be convenient to clear the ground by referring at the outset to the connection between the Hindu Law doctrine as to the pious obligation of the son to pay the father's debts and the father's power to alienate joint family property including the son's share for the discharge of those debts.

As early as in *Girdharee Lal* v. *Kantoo Lal*[3], their Lordships quoted the following passage from the judgment of Knight Bruce, L.J., in *Hanooman Prasad's case*,[4] namely:—

" The freedom of the son from the obligation to discharge the father's debt has respect to the nature of the debt and not to the nature of the estate, whether ancestral or acquired by the creator of the debt".

and proceed to explain this dictum as follows:—

" That is an authority to show that ancestral property which descends to a father under the Mitakshara Law is not exempted from liability to pay his

1. (1912) 23 M.L.J. 18: L.R. 39 I.A. 109: I.L.R. 34 All. 296 (P.C.).
2. (1936) M.W.N. 866.
3. (1874) L.R. 1 I.A. 321 at 331.
4. (1856) 6 M.I.A. 393 at 421.

debts because a son is born to him. It would be a pious duty on the part of the son to pay his father's debts, and it being the pious duty of the son to pay his father's debts, the ancestral property, in which the son as the son of his father acquires an interest by birth, is liable to the father's debts."

The same idea was expressed by Lord Hobhouse in the following sentence in *Nanomi Babuasin* v. *Modun Mohun*[1]:

"The decisions have established the principle that the sons cannot set up their rights against their father's alienation for an antecedent debt, or against a creditor's remedies for their debts, if not tainted with immorality".

The result of this view has been to treat even the son's share in the joint family property as at the *disposal* of the father to the extent necessary to discharge the father's debts unless they are illegal or immoral. It is on this footing that under S. 266 of the old Civil Procedure Code and S. 60 of the Code of 1908 the Courts have held that a decree against the father can be executed even against the son's share in joint family property; and S. 53 of the Code of 1908 put the matter even more directly by providing that at the father's death joint property which under the Hindu Law would have been available for the satisfaction of his debts must be treated for the purpose of execution as *assets* descending to his undivided sons as *legal representatives*. Likewise, under the Insolvency Acts, Courts in India have held that the Official Assignee in the father's insolvency can exercise the *power* which the father has under the Hindu Law to sell even his son's share in joint family property for the discharge of his debts. And this view has now been affirmed by the Judicial Committee in *Sat Narain* v. *Rai Bahadur Sri Kishen Das*[2], from Lahore. It is thus on the principle of the liability of the son's share for the discharge of the father's debts that the father's power of disposal of the son's share for the satisfaction of those debts has been based. It is true that a distinction has been made between an involuntary sale of the father's property for the satisfaction of his debts and a voluntary disposition by him, by introducing the limitation that in the latter case the debt must be antecedent to the transfer of property and not contemporaneous with the transfer. As pointed out in the Full Bench judgment of this Court in *Venkataramanayya Pantulu* v. *Venkataramana Doss Pantulu*[3], and the judgment of the Privy Council in *Brij Narain* v.

1. (1885) L.R. 13 I.A. 1: I.L.R. 13 Cal. 21 at 35 (P.C.).
2. (1936) 71 M.L.J. 812: L.R. 63 I.A. 384: I.L.R. 17 Lah. 644 (P.C.).
3. (1905) 16 M.L.J. 69: I.L.R. 29 Mad. 200 (F.B.).

Shanmukam v. Nachu Ammal.

Varadachariar, J.

Mangal Prasad[1], this limitation was introduced on the principle of *stare decisis*; but in none of the cases has this power of the father been further limited by restricting it to cases in which he also happens to be the managing member of the joint family. A person who is the managing member has in that capacity another kind of power of disposition over joint family property, namely, that for purposes of family necessity or clear family benefit he may dispose of family property even to the extent of binding the shares of persons who are not his descendants. The two powers respectively possessed by the father and the manager have been contrasted in the judgment in *Brij Narain* v. *Mangal Prasad*[1]. The one arises out of the relationship of father and son; the other arises out of a representative character, whether *de jure* or *de facto*, where the transferor is in management of the family property. There is no doubt reference in more than one place in the judgment in *Brij Narain* v. *Mangal Prasad*[1] to the father as manager, but that is only to contrast the position of the father manager with any manager who is not a father and could not have been intended to restrict the powers of the father as such to cases in which he also happens to be the manager. Their Lordships only purported to state the rule deducible from the earlier decisions of the Board and no such limitation is found in the earlier decisions.

It has sometimes been attempted to restrict the doctrine as to the pious obligation of the son to pay his father's debts to cases in which the father also happens to be the manager. If this limitation were well-founded it would no doubt also follow that the father's power of disposing of the son's share for the satisfaction of his own debts must be likewise limited; but the preponderance of authority is against the limiting of the doctrine of the pious obligation of the son to cases where the father also happens to be the manager. See *Mutyala Virayya* v. *Parthasarathy Appa Rao*[2] and *Chhotey Lal* v. *Ganpat Rao*[3]. Even in *Rayulu Aiyar* v. *Vairavan Chettiar*[4] the learned judges gave a decree against the minor defendant as on a 'money claim'. There can indeed be no justification for any such limitation when it is remembered that the son's obli-

1. (1923) 46 M.L.J. 23: L.R. 51 I.A. 129: I.L.R. 46 All. 95 (P.C.).
2. (1933) 65 M.L.J. 417: I.L.R. 57 Mad. 190.
3. (1934) I.L.R. 57 All. 176 (F.B.).
4. (1936) M.W.N. 866.

Shanmukam v. Nachu Ammal.

Varadachariar, J.

gation to pay his father's debts was under the original Smritis independent of the possession of assets or joint family property. It depended purely upon the relationship of the father and son. It is only by case-law developed during the early part of the 19th century and by Statute law in the Bombay Presidency that the liability of the son for the father's debts was limited to assets and to joint family property. The true *basis* of the obligation therefore is the relationship of father and son and not the accident of the father being the manager of the joint Hindu family.

In view of these considerations, we find ourselves unable to accept the basis on which the decision in *Rayulu Aiyar* v. *Vairavan Chettiar*[1] has proceeded. The learned Judges say that so far as the transactions relating to joint family property are concerned, it is only the joint family manager and not the father that can be regarded as the guardian of minor members of the family and as competent to transfer their interests. This will undoubtedly be true so far as transactions sought to be supported on the basis of family necessity or benefit are concerned; but as we have endeavoured to show, the liability of the son's share in the family properties to be called upon to satisfy his father's debts exists independently of its liability to be sold or mortgaged for the purposes of the larger family. To the extent required for satisfying the father's debt, there can be no doubt that the father's creditor can attach and sell not merely the father's share of the joint family property but also the son's share and for this purpose it makes no difference that the father is only a junior member. If the creditor can so attach and sell, it seems to us to follow for the reasons that we have already stated that the father has the power to transfer the son's share also for the same purpose. Otherwise the creditor cannot reach the son's share as falling within the language of S. 60 or S. 53, Civil Procedure Code, which undoubtedly postulates that the father has got the power so to transfer.

We hold that the suit mortgage is binding upon the second defendant's share in the hypothecated properties to the extent to which ths debts referred to in Ex. A are shown to be antecedent debts. The learned Subordinate Judge has pointed out that no serious attempt has been made to prove that the debts

1. (1936) M.W.N. 866.

Shanmukam v. Nachu Ammal.

Varadachariar, J.

as such are not binding upon the son on the ground of illegality or immorality.

As stated already, the mortgage bond was executed to secure re-payment of a sum of Rs. 11,000. Out of this amount, we agree with the lower Court that all the items mentioned in Ex. A except the last may be regarded as antecedent debts or otherwise, binding on the son. As regards the last item of Rs. 2,430 the learned Judge rightly points out that a sum of Rs. 350 must be held to have passed for the discharge of antecedent debts, because it represents the amount disbursed to the creditors referred to in some of the previous items. In respect of the balance of Rs. 2,080 the document acknowledges it as cash then received. There is no doubt a further statement that it was required for discharging other debts incurred " for the purpose of my family"; but no details are available as to the debts so discharged. The evidence of P.W. 3 as to the kind of enquiry which the lender's agent is said to have made for the purpose of satisfying himself that there were antecedent debts to be thus discharged is far from satisfactory. The creditor will not discharge the burden of proof lying upon him merely by saying that he found it inconvenient to press the father to give details of the debts which he had or proposed to discharge when the father said that it was a delicate matter. We must accordingly hold that the mortgage Ex. A is as such binding upon the share of the son the second defendant, in the hypothecated properties, only to the extent of Rs. 11,000 *minus* Rs. 2,080 or 8,920. This sum will carry interest as per the terms of the lower Court's judgment. In respect of the balance of Rs. 2,080 the plaintiff will be entitled to relief against the second defendant only upon a money claim and not on the mortgage as such. Adopting the course followed by Pandrang Row and K.S. Menon, JJ., in *Vennimal Pillai* v. *P. & O. Banking Corporation, Ltd.*,[1] we would add a direction in the decree to the effect that if after the sale of the share of the first defendant in the hypothecated properties for the full amount of the decree already passed by the lower Court and of the second defendant's share in the hypothecated properties for the amount for which we are now giving the plaintiff a mortgage decree as against the second defendant, the amount of the decree is not fully discharg-

1. (1936) M.W.N. 863.

Shanmukam *v.* Nachu Ammal.

Varadachariar, J.

ed, the plaintiff will be entitled to proceed against the second defendant's interests in the hypothecated properties if any still remaining and against his interests in other joint family properties for the recovery of this sum of Rs. 2,080 with interest as per the terms of the lower Court's decree.

As regards the direction in cl (5) of the lower Court's decree, relating to the liberty to apply for a personal decree, appellant's learned counsel drew our attention to an inaccuracy which may perhaps mislead Court at later stages of this suit. As drafted, that clause provides for liberty to apply for a decree against the first defendant personally and the other properties of defendants 1 and 2. There is no objection to the general reference to the other properties of the first defendant but so far as the *other* properties of the second defendant are concerned, it ought to be made clear that the liability can attach only to the second defendant's share in family properties and not to properties which can be regarded as his own. Cl. 5 of the lower Court's decree will be modified so as to make this clear.

We do not think it necessary to interfere with the direction of the lower Court as to costs. As regards the costs of this appeal we think it proper to direct that the appellant will pay the three-fourths of the first respondent's costs in the appeal and the appellant will himself pay the court-fee due to Government on the memorandum of appeal.

B.V.V. —— *Decree modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR HORACE OWEN COMPTON BEASLEY, *Kt.*, *Chief Justice* AND MR. JUSTICE HORWILL.

C. M. Raju Chetty .. *Appellant** (*Respondent*)

v.

O. C. Raju Chetty and another .. *Respondents* (*Applicants*).

Raju Chetty *v.* Raju Chetty

Lunatic—Estate of lunatic managed by committee—Accounts not filed for a period of 21 years—Amounts without previous sanction of Court spent—Retrospective sanction by Court afterwards on enquiry—Whether Court empowered to do so—Exceptional circumstances existing for the Court sanctioning the expenditure.

Courts do have a discretion to sanction an expenditure which has been made without the previous sanction of the Court having been obtained,

* O. S. A. No. 26 of 1936. 28th October, 1936.

Raju Chetty *v.* Raju Chetty.

although such discretion ought only to be exercised where the reasons are very strong, because the Courts in such matters ought to have a discretion to do thereafter that which they are empowered to allow on applications made in the first instance.

Where a committee was appointed by order of Court for a lunatic with directions to utilise the income from a certain property of the lunatic for the benefit of the lunatic's family but the committees who acted in due succession did not file accounts for a period of 21 years from the date of their appointment and the trial Court which went into the matter allowed certain items of expenditure retrospectively because (1) the person on whom a considerable portion of the income was spent was the next heir to the lunatic, and (2) because in the trial Court's opinion there was evidence that the lunatic herself, if of sound mind, would have made the expenditure, namely, for the education and maintenance of the heir and the family she was living with.

Held, that though the negligence on the part of the committees in not having filed accounts for a period of 21 years was certainly reprehensible the expenditure sanctioned by the trial Court was proper owing to the strong exceptional circumstances, namely, (1) that no damage whatever had been done to the lunatic's estate; (2) that the accuracy of the accounts was, after due inspection by the objector, not questioned; (3) that the *bona fides* of the committees was not questioned thereafter; (4) that the original order appointing the committees authorised an expenditure on the maintenance of the family; (5) that the person on whom a considerable amount had been spent was the next heir; (6) that the testator himself from whom the lunatic got her property had desired her to live with the heir and the other members of the family; and (7) that there was evidence upon which the trial Court could reasonably hold the lunatic herself, if of sound mind, would have made the expenditure in question.

In re *Darling*, (1888) L. R. 39 Ch. D. 208; In re *Frost*, (1870) L.R. 5 Ch. A. 699; and In re *Sparrow*, (1882) L.R. 20 Ch.D. 320, referred to.

On appeal from the order of the Honourable Mr. Justice Lakshmana Rao dated 11th November, 1935, and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Application No. 1451 of 1935 in O. P. No. 95 of 1910, *In the matter of* The Supreme Courts Lunacy Act (XXXIV of 1858) and *In the matter of* Chingleput Maragada Ammal, a lunatic.

V. Ramaswamy Aiyar for *A. B. Nambiar* for Appellant.

S. Duraiswami Aiyar for *V. Radhakrishnayya* for Respondents.

The Court delivered the following

JUDGMENT.—This is an appeal from an order of Lakshmana Rao, J., upon an application by the Committees of the estate of one Maragadammal, a lunatic, to sanction certain items of expenditure incurred by them since their appointment for which the previous sanction of the Court had not been

obtained. The expenditure was sanctioned by our learned brother. Hence this appeal. Raju Chetty v. Raju Chetty.

The facts of the case are that one Alagappa who died in 1903 had a wife named Angammal who died in 1909. He had three daughters, Ammakannu, who married Manicka Chetty, Maragadammal, the lunatic and Panchaksharammal. Ammakannu died before Alagappa and after her death Maragadaammal was given in marriage to Manicka Chetty. This was in the lifetime of Alagappa. Ammakannu and Manicka Chetty had two children, namely, Balasundaram and Rajammal. Alagappa made a will leaving some of his property to the lunatic and in that will directed her to continue to live with Balasundaram who was then living and his widow Angammal, Panchaksharammal and Rajammal (Ammakannu's daughter) as one family. This the lunatic did. Angammal died, as already stated, in 1909 and thereafter the lunatic continued to live with the survivors of the family. Manicka died in 1913 and she then lived with his children Balasundaram and Rajammal and Panchaksharammal until Balasundaram's marriage when she was taken to live in his house. In 1910 Maragadammal was found to be a lunatic and Manicka Chetty, her husband, was appointed committee of her person and estate. The order of appointment has an important bearing on this matter. That order stated that the estate consisted of the property known as "Abbotsbury" and that the committee was empowered to apply its rent for its upkeep and the maintenance of the lunatic and her family. As before mentioned Manicka Chetty died in 1913 and his brother Govindarajulu Chetty applied to be appointed as committee. That application was opposed and the Official Trustee was appointed. He declined to act and by an order dated 20th January, 1914, the present Committees, the elder sister Panchaksharammal and O. C. Raju, the husband of Rajammal (the daughter of Manicka Chetty and Ammakannu) were appointed Committees of the estate and the powers given by the Lunacy (Supreme Courts) Act of 1858 were conferred upon them and they were directed to submit half-yearly accounts. Nothing was said regarding the maintenance of the lunatic or her family and the committees thought that the rents of "Abbotsbury" were to be applied therefor as before; and it cannot be said that they were unreasonable in so thinking. Most unfortunately the two committees did not file any accounts at all from the date of

Raju Chetty v. Raju Chetty.

their appointment until the date of the present proceedings—a period of nearly 21 years. This failure on their part is sought to be excused on the ground of inexperience, O.C. Raju, the second committee being only 22 years of age on the date of his appointment. The failure to file accounts is undoubtedly most reprehensible particularly so because during the interval a large expenditure was incurred by the committee without the sanction of the Court having been obtained previously. The appellant here C. M. Raju is the husband of Chinnathayammal, one of the sisters of Alagappa and in 1934 he presented an application to the High Court asking for directions to the committees to file and pass their accounts and an enquiry as regards the management of the estate of the lunatic and charging the second committee with various acts, misfeasance and malfeasance and serious neglect of duty and stating that a sum of Rs. 31,715-13-7 ought to be surcharged against him and praying for his removal from office and on 3rd May, 1934, an order was made directing the committees to file their accounts by 14th August, 1934 and get them passed. An account was filed accordingly on 14th August, 1934, relating to the period from 25th June, 1913 to 5th August, 1934. The accounts were gone into by the passing officer an order having been made previously on 3rd May, 1934, by Stone, J., directing that the appellant was to have inspection of all accounts. According to the passing officer's report although an affidavit had been filed by the appellant objecting to the correctness of the entries in the accounts and to the propriety of the expenditure, after the items of receipts and disbursements were gone into with the vouchers in the presence of the appellant and his advocate the correctness of the accounts was not disputed but only the propriety of the expenditure was objected to. The passing officer allowed some of the expenditure incurred but disallowed the remainder which amounted to a considerable sum on the ground that it was beyond his province as passing officer to ascertain how far the expenditure was properly allowable and that the Court alone could sanction the expenditure having regard to the fact that it was for the benefit of persons other than the lunatic. He accordingly disallowed the following items of expenditure, *viz.*, Balasundaram's account Rs. 7,411-8-9; maintenance Rs. 28,140-0-0; charities performed Rs. 956-0-0; presents to relations Rs. 1,027-4-9; miscellaneous items Rs. 3,953-4-0 making

a total of Rs. 41,488-5-6. He also found that there was a balance in the committee's hands in addition to the expenditure disallowed of Rs. 4,683-8-6. Before us the objection to the expenditure under the heads of "charities performed", "presents to relations" and "miscellaneous items" was not pressed, the expenditure under the other two heads being objected to only. Lakshmana Rao, J., sanctioned the expenditure under all the before-mentioned heads although the sanction of the Court had not been obtained in the first instance; but he made no order as to costs, though we are informed that he allowed the appellant some costs out of the estate of the lunatic. In his order our learned brother says:

> "The *bona fides* of the applicants who are managers without remuneration was not disputed nor was it seriously contended that the amount spent was excessive or unreasonable",

and, as before stated, the accuracy of the accounts was admitted before the passing officer. Taking the amount spent on Balasundaram till 1923 and the maintenance of the lunatic and her household, Lakshmana Rao, J., applies the principles that the first care is the comfort of the lunatic who should have everything that his or her circumstances will allow and the next care is the household of the lunatic and states, that the final principle is that the Court should not refuse to do on behalf of the lunatic what the lunatic himself would probably have done. We are satisfied that the learned Judge has correctly stated the principles. In *Darling,* In re[1], the head note of which reads as follows:—

> "It is not the duty of the Court to deal benevolently or charitably with the property of a lunatic, and applications for allowances out of the surplus income of a lunatic to poor collateral relations who have no legal claims upon him for provision are to be discouraged",

and it was held that

> "there being nothing to show that the lunatic would have done what the Court was asked to sanction, the mere fact that the collaterals were in humble circumstances and had difficulties in providing themselves with necessaries was not sufficient to justify the Court in granting the application and that it must be refused."

The principles upon which Courts should act are set out by Cotton, L.J., on p. 211; and it is stated by him that Courts sometimes make considerable allowances for persons who have legal claims upon a lunatic such as a son or a daughter and also for persons who have moral claims upon him

1. (1888) L.R. 39 Ch.D. 208.

Raju Chetty v. Raju Chetty.

and that the cases do show however that the Court has sometimes made an allowance to collaterals. He then states as follows:—

"I pass over those cases in which an allowance has been made by the Court in favour of a person who is the next successor to the lunatic's estate, for it is the interest of every possessor of an estate that his successor should be educated and brought up in such a manner as to enable him to fulfil the duties attaching to the ownership of the estate, and where the successor is in such a position as not to be able to obtain an education suitable to his prospects, the Court will, no doubt, make an allowance, and sometimes has made a very considerable one.

Here the lunatic had several cousins, who happen to be his next of kin, and while sane he made small allowances to some of them; and the Court, acting on the principle that the Court will do for the lunatic what the lunatic would have done himself if of sound mind, has continued these allowances.

But we are now asked to sanction an increase of the allowance to some of these persons, and also to sanction further allowances to others of them. Now to make such an order would, in my opinion, be contrary to the principles n which the Court acts in administering the property of a lunatic".

Bowen, L.J., said:

"The Court has always considered that its jurisdiction to make allowances to collaterals ought to be exercised with the utmost jealousy. The case of successors to property depends on a different principle. But in cases of collaterals who are not successors the Court ought only to do that which the lunatic would have done himself if he had been of sound mind. If it would be shown that the lunatic would have done that which we are asked to do, that would be a different matter. In my opinion the evidence falls short of doing that".

Therefore in England Courts may sanction an allowance to be paid to a person who is not the lunatic where such person is the next heir or successor to the lunatic's estate, and collaterals if they are the next of kin, or if not, if the lunatic is of sound mind would have made such an allowance for which of course there must be some evidence. Balasundaram, it must be noted, is the next heir to the lunatic's estate. In *Frost*, In re[1], weekly allowances were ordered out of the surplus income of a wealthy lunatic to needy collateral relatives who were supposed to be her next of kin, though their title, as such had not been established, and for whom the lunatic, while sane, had expressed an intention to make some provision. James, L.J., on p. 702 said:

"In this case it appears highly probable that if the alleged cousins do not establish their claim to be next of kin no one else will. Considering this, and considering their poverty, the evidence of the intention of the lunatic to do something for them, and the amount of her income, which far exceeds any-

1. (1870) L.R. 5 Ch. Appeals 699.

Raju Chetty *v.* Raju Chetty.

thing that can ever possibly be required for her own wants, I think that I may venture to make the order asked, which will do no more than what the lunatic herself probably would have done had she continued sane".

In *Sparrow*, In re,[1] a lunatic, aged sixty-four, was tenant for life of certain real estates, of which his nephew, aged twenty-eight, was tenant in tail in remainder, producing a considerable yearly income. The nephew had been found heir-at-law and one of the next of kin of the lunatic. The Court, upon the nephew's petition, directed an allowance of £500 per annum to be made to him out of the surplus income of the lunatic after providing for a yearly sum for the lunatic's maintenance, in spite of the opposition of some of the next of kin, upon the terms of the petitioner charging the estate with the re-payment of the sums received in respect of such allowance; and in subsequent proceedings the allowance of £500 was increased by £200. On the other side a number of English cases were cited by the appellant in support of his contention that the trial judge ought not to have sanctioned this expenditure because it had been incurred without the previous sanction of the Court. The argument indeed went to the length of stating that under the English decisions there was a definite prohibition against the granting of such sanction. The cases referred to upon examination certainly do not establish the latter proposition and as regards the former are merely instances where the Courts have, on the facts of those cases, refused to give sanction. One of these is In the matter of *Sir James Langham a Lunatic*[2], where a committee who, having been authorised by the Court to expend a certain sum in rebuilding a farm house, expended half as much again in building one of larger size on a different site, was not allowed the excess even though what he had done appeared to be beneficial to the estate. This case was stated by Lord Cottenham the Lord Chancellor to be an extreme case because the Court had given the committee leave to enter into a particular contract and he took upon himself to enter into quite a different one involving much greater expense. The Lord Chancellor stated that such conduct was setting the Court at defiance. In Ex parte *Marton*[3], the petition was presented by the Committee of the estate of a lunatic, tenant in tail, with remainders over to the committee and others praying to be

1. (1882) L.R. 20 Ch.D. 320.
2. (1847) 2 Ph. 299 : 41 E.R. 958.
3. (1805) 11 Ves. Jun. 397 : 32 E.R. 1140.

Raju Chetty v. Raju Chetty.

allowed for expenditure upon the estate made without any previous application alleging that great improvements had been made. Lord Eldon expressed his regret that the Court had in a hard case been induced to relax the rule not to allow any expenditure made without previous application the consequence of which was that committees never made application and added that as there was that instance he would see what could be done in that case which appeared fair, desiring it to be understood that in future expenditure made without a previous application would never be allowed. This threat he subsequently carried out in the next case reported in the same volume, namely, Ex parte *Hilbert*[1], where the committee of the estate of a lunatic tenant for life, had expended to the amount of £6,000 upon the estate and as to £4,000 without an application. Lord Chancellor Eldon said that such a thing could not be permitted. I do not understand these cases as stating that there is a definite prohibition against retrospectively sanctioning expenditure regardless of every consideration which would show that such sanction ought to be granted. Indeed, Ex parte *Hilbert*[1] shows that there had been exceptional cases. In our view, Courts do have a discretion to sanction an expenditure which has been made without the previous sanction of the Court having been obtained although such discretion ought only to be exercised where the reasons are very strong, because Courts in such matters as this ought to have a discretion to do thereafter that which they are empowered to allow on applications made in the first instance. That the Court had the power to sanction the expenditure in question *have* on an application made to it for permission to do so is we think clear, having regard to the cases already referred to by Mr. Duraiswami Aiyar on behalf of the respondent. The learned trial Judge allowed the expenditure retrospectively because Balasundaram is the next heir to the lunatic and because in his opinion there was evidence that the lunatic herself, if of sound mind, would have made the expenditure, namely, the education and maintenance of Balasundaram and the family she was living with. There is certainly evidence that the lunatic preferred to live with Balasundaram and, as before stated, the testator himself so directed. We think that the learned Judge was justified in holding that the lunatic herself would have made that expendi-

1. (1805) 11 Ves. Jun. 397: 32 E.R. 1141.

ture. The expenditure on the maintenance and education of Balasundaram can clearly be supported on the ground that he was the next heir of the lunatic (*see* the observations of Cotton, L.J., in In re *Darling*[1] already referred to). There is another important fact as well and it is that in the first order of 1910 appointing Manicka committee of the lunatic there is a direction that the income from the property "Abbotsbury" is to be spent in its upkeep and the maintenance of the lunatic and his family and Balasundaram obviously was one of the family. It is true that the subsequent order does not contain any such direction. In fact it contains no specific direction as to the application of income; but it can be read as reasonably supplementing the previous order of 1910; and it is made in the same O. P. Against this, the only thing that is urged, although its importance cannot be minimised, is that for 21 years the committees never rendered any accounts at all. This, as we have stated earlier in this judgment, is a most reprehensible thing. If no case has been referred to in which such laches as this were in evidence, it is because it is almost impossible to imagine that there can have been any similar case before; and if the objection which is founded upon this deplorable neglect is to be overruled, it is because of strong exceptional circumstances. These are that no damage whatever seems to have been done to the lunatic's estate, that the accuracy of the accounts was, after due inspection by the appellant, not questioned, that the *bona fides* of the committees was not questioned thereafter, that the original order appointing the committees authorises an expenditure on the maintenance of the family, that Balasundaram is the next heir, that the testator himself from whom the lunatic got her property desired her to live with Balasundaram and the other members of the family as one family and that there is evidence upon which the learned trial Judge could reasonably hold that the lunatic herself, if of sound mind, would have made the expenditure in question. Having regard to all these matters and in view of our opinion that the trial Court has a discretion in such matters, can it be said that in having regard to the considerations put forward on behalf of the committees the learned trial Judge has wrongly exercised his discretion and that nevertheless and despite all these matters he ought to have refused sanction? In other

1. (1888) L.R. 39 Ch. D. 208 at 211.

Raju Chetty *v.* Raju Chetty.

words, ought he to have punished the committees for not having filed and passed the accounts for 21 years by surcharging them with this expenditure and undoubtedly driving the second committee to insolvency? In our opinion, in view of the exceptional circumstances of this case, the trial Judge was justified in exercising his discretion in the manner he did; and it follows that this appeal must be dismissed. On the question of costs, we think that as the appellant has failed, he must bear the costs of this appeal. It was one thing to carry this matter up to the stage of enquiry and into the trial Court. Not having succeeded there, we see no real justification for his pursuing the matter further. As he has chosen to do so and has failed, it is only right and proper in our opinion that he should bear the costs of the appeal.

The committee must apply on the Original Side for the direction of the Court for the investment of surplus income in his hands.

K.C. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR HORACE OWEN COMPTON BEASLEY, *Kt., Chief Justice* AND MR. JUSTICE HORWILL.

Alluri Bapanna .. *Appellant** (*Appellant in A. A. A. O. No. 78 of 1932 on the file of the High Court*)

v.

Inuganti Vengayya and others .. *Respondents* (*Respondents 1, 2, 5, 6 and 7 in do.*).

Bapanna *v.* Vengayya.

Civil Procedure Code (V of 1908), O. 21, r. 2 and r. 16—Uncertified payment—Assignment of decree—Assignment deed accepting the payment—Deed filed in Court in O. 21, r. 16 petition—If assignee can ignore the payment—Formal certification or request to record satisfaction not necessary—Sufficient if decree-holder admits payment before executing Court—Plea that a payment has not been given credit to—When res judicata—*Constructive* res judicata *in execution proceedings—Conditions for application of.*

Where the assignment deed assigning a decree expressly refers to a payment made towards the decree, which payment however was not certified formally under O. 21, r. 2, and assigns to the assignee the right to execute for the balance after making the deductions mentioned in the deed, and the assignee files the deed into Court with a prayer to recognise the assignment and allow him to execute, the assignee is not entitled to execute for the whole amount ignoring the uncertified payment because (1) the assignment deed assigned to him the right to execute only for such sum as was due after making the deductions mentioned in the deed; (2) the transferee decree-holder would be

---

*L. P. A. No. 15 of 1936. 5th November 1936.

bound by the terms of the transfer deed and affected by admissions of the decree-holder that uncertified payments had been made; and (3) there was sufficient certification of payment under O. 21, r. 2 when the transfer deed containing the admission by the decree-holder that the uncertified payment had been received was filed into Court and the Court was asked by the Court to examine the deed of transfer and recognise the assignment. No formal certification or application to record payment is necessary, nor is it necessary that the decree-holder should ask the Court in some way to record the payment. If a decree-holder admits to the executing Court that he has received a payment, he cannot be allowed by that Court to execute his decree for the same amount over again.

Subramaniam v. *Ramaswami*, (1932) 62 M.L.J. 562: I.L.R. 55 Mad. 720 (F.B.), distinguished.

The uncertified payment was in 1924 and the assignment of the decree was in 1929. In between there was an application for execution filed in 1926 by the original decree-holder and in 1929 an application by the assignee decree-holder before the Court which passed the decree requesting the Court to transfer the decree for further execution to another Court where the properties were situate. In neither of these stages was it raised by the judgment-debtor that this payment was not given credit to. It was contended that it was barred by *res judicata* and not now open to him to raise that plea before the transferee Court.

Held, that it was not barred by *res judicata*. So far as 1926 stage is concerned, it was not barred because the plea was not *then* open to the judgment-debtor as it was an uncertified payment which would not be recognised by the Court and a failure to raise such a point that could not in any way help him could not subject him to the bar of *res judicata*. Even the failure to raise it before transfer was ordered cannot operate as *res judicata* because even after giving credit to this payment there was still a balance due under the decree for which the decree has to be transferred. Further the mere fact that the sum for which the decree is sought to be executed is not the correct amount due by the judgment-debtor to the decree-holder would not prevent execution from proceeding. The principle of *res judicata* can only apply to cases where the Court could not have acted as it did if the judgment-debtor had successfully raised the points which are sought to be used against him as *res judicata*. It is only a failure to raise such pleas as (1) that the petitioner has no right to execute; or (2) that the judgment-debtor is not liable to satisfy the decree; or (3) that the decree is inexecutable; or (4) that execution is barred by limitation, etc., that can operate as constructive *res judicata* in execution proceedings.

Appeal under cl. 15 of the Letters Patent against the judgment of the Hon'ble Mr. Justice Wadsworth dated 2nd December, 1935, preferred to the High Court against the order of the Court of the Subordinate Judge of Ellore in A. S. No. 128 of 1930 preferred against the order of the Court of the District Munsif of Kovvur dated 15th February, 1930 and made in C. M. P. No. 27 of 1930 in O. S. No. 24 of 1930 on the file of the Court of the Subordinate Judge of Cocanada.

K. Venkatarama Raju for Appellant.

V. Govindarajachari and *B. V. Ramanarasu* for Respondents.

Bapanna v. Vengayya.

Horwill, J.

The judgment of the Court was delivered by

Horwill, J.—On 26th June, 1923, Yellappu Bapanna obtained part satisfaction of her decree to the extent of Rs. 2,500 and in December of the same year she obtained another sum of Rs. 1,000. Both these amounts were certified. On 3rd August, 1924, Rs. 2,520 were paid to her but the payment was not certified. On 10th January, 1929, the decree was transferred to the present appellant by Ex. I. That document recites that two sums of Rs. 2,500 and 2,520 respectively had been collected towards the decree amount, that the decree-holder is entitled to execute for the balance, and that she transferred her right to execute to the appellant. Both the trial Court and the lower appellate Court held that on a construction of Ex. I the right transferred to the appellant was to execute for such sum as was due after making the deductions mentioned in the deed. In second appeal Wadsworth, J., was of the same opinion and referred to the possibility that the document of transfer and the filing of E. P. No. 231 of 1929 by the appellant might amount to a certification within the meaning of O. 21, r. 2. Against this judgment of Wadsworth, J., the present Letters Patent Appeal has been preferred.

The main point discussed in this appeal is whether in view of the terms of Ex. I, the appellant is entitled to ignore the uncertified payment. The argument of the learned counsel for the appellant is that in spite of her admissions the decree-holder herself could have executed for an amount which included this uncertified payment and that as she had conveyed all her rights under the decree to the appellant, he had the right to ignore this payment in executing the decree. Mr. Venkatarama Raju has argued with great insistency that the Full Bench case of this Court, *Subramaniam* v. *Ramaswami*[1], concludes the matter; but in that case it was only decided that a transferee decree-holder was in no worse a position than the transferor and that the judgment-debtor was prevented by O. 21, r. 2 (3) from relying upon an uncertified payment. It was not considered how far the rights of the transferee-decree-holder would be determined by the terms of the transfer deed or affected by admissions that uncertified payments had been made. The fallacy in the argument of Mr. Venkatarama Raju

1. (1932) 62 M.L.J. 562: I.L.R. 55 Mad. 720 (F.B.).

lies in the supposition that a decree-holder has a *right* to execute for a sum uncertified which he can transfer to another person. Certainly sub-r. 3 to O. 21, r. 2 does not give a right to a decree-holder to ignore any payment against the decree amount. On the contrary, sub-r. 1 says that he shall certify the payment. The purpose of O. 21, r. 2 (3) which merely prevents the judgment-debtor from pleading an uncertified payment, seems to be to avoid unnecessary delay and to obviate the trial of complicated issues in execution proceedings which might prevent decree-holders from realising promptly the fruit of their decrees. The transfer deed Ex. I expressly states that the decree-holder herself had no right to execute for this sum of Rs. 2,520 that she was entitled to execute only for the remainder, and that it was this right to execute for the remainder that she transferred to the appellant. It was because he could not execute for this uncertified amount that the consideration for the transfer was correspondingly decreased. No authority has been quoted to us for the contention of the learned counsel for the appellant that the Court is bound to ignore the terms of the transfer deed and the rights that the transferee obtains under the deed. Moreover when examined by the Court on his application to transfer the decree, the appellant admitted that Ex. I gave him the right to execute only for what was due on the decree after deducting this uncertified payment. We therefore hold that the decision of our learned brother on this point was correct.

We are also of opinion that his judgment can be supported on the ground that the certification by the decree-holder required by O. 21, r. 2 (*i*) was given. In *Raja Shri Prakash Singh* v. *Allahabad Bank, Ltd.*[1], a Privy Council case of 1928, the nature of the certification required under O. 21, r. 2 (*i*) was discussed, and it was held that no application by the decree-holder was required and that even though the certificate was in the form of a petition the certificate was not in fact a petition. Their Lordships held that the rule contemplates a simple procedure, namely, a certificate of payment given to the Court. In *Thimma Reddi* v. *Subba Reddiar*[2], Sadasiva Aiyar, J., says that:

> " A certificate under O. 21, r. 2 by the decree-holder in his petition is a sufficient certificate."

---

1. (1928) 56 M.L.J. 233: L.R. 56 I.A. 30: I.L.R. 3 Luck. 684 (P.C.).
2. (1918) 49 I.C. 141.

Bapanna *v.* Vengayya.

Horwill, J.

In *Chinna Mummidi Royal* v. *Raja Somasekara Chikka Royal*[1], the decree-holder admitted certain payments but stated that the money was used for purposes which did not amount to a discharge of the decree. It was held that:

"The fact that the plaintiff has not formally certified the payment but has only incidentally referred to a payment can make no difference."

This principle is only in accordance with common sense and equity. A decree-holder who admits to the executing Court that he has received a payment cannot be allowed by that Court to execute his decree for the same amount over again. Such a procedure would make the process of the Court farcical. In *Chinnaswami Kavirayer* v. *Periathambi Butler*[2] a reference to an uncertified payment was made on an affidavit. It was nevertheless held that such an admission amounted to a certification sufficient to satisfy the requirements of O. 21, r. 2 (1). *Eusuffzeman* v. *Sanchia Lal Nahata*[3] was a case in which the decree-holder referred to the payment in the execution petition itself; and it was held that such a reference amounted to a certification of the payment. It would appear from the above cases that it does not matter under what circumstances the payment by the judgment-debtor is brought to the notice of the executing Court by the decree-holder. Such bringing to notice is sufficient to satisfy the requirements of O. 21, r. 2 and to prevent the decree-holder from executing over again for a sum that he admitted having received. It is argued by the learned counsel for the appellant that even though it may not be necessary for the decree-holder to put in a formal application to record payment, it is at any rate necessary that he should ask the Court to do so. Such a contention is certainly not warranted by any of the decisions above referred to or by any other case to which our attention has been drawn. On the contrary, in *Chinna Mummidi Royal* v. *Raja Somasekara Chikka Royal*[1] the decree-holder, far from asking the Court to certify the payment, strenuously opposed the certification.

The circumstances under which we are asked to find that there was a certification by the transferee decree-holder of this payment of Rs. 2,520 are that in 1929 the appellant filed E.A. No. 231 of 1929 (Ex. A) asking the Court to recognise the transfer. The appellant therein asked the Court to peruse the

1. A.I.R. 1929 Mad. 783. 2. A.I.R. 1929 Mad. 811.
3. (1915) I.L.R. 43 Cal. 207.

E. P. records and after examining the deed of transfer to issue notice to the defendants under O. 21, r. 16 and then to recognise the transfer. He also requested the Court to transfer the decree under S. 39, Civil Procedure Code, to the District Munsiff's Court, Kovvur, for further execution. In our opinion this was sufficient to draw the attention of the Court to the deed of transfer, in which there was a recital that this sum of Rs. 2,520 had been paid and that the right conferred by the decree-holder on the appellant was one to execute for such amount as might be due after deducting that payment and another.

The learned counsel for the appellant has also put forward a further argument that the judgment-debtor's claim to have his payment recognised is barred by *res judicata,* because he made no mention of this payment either during the execution proceedings in 1926 (where the decree-holder had deducted only the two sums of Rs. 2,520 and Rs. 1,000) or in 1929 when execution proceedings were initiated by the appellant. It has often been pointed out by this Court that S. 11 does not apply to execution proceedings; but for the same reasons that S. 11 became necessary for controlling the trial of suits it has been necessary to apply the same or similar principles to execution proceedings. Caution has however to be exercised in applying the principle of constructive *res judicata* to execution proceedings. It can only apply to cases where the Court could not have acted as it did if the judgment-debtor had successfully raised the points which are sought to be held by this principle against him. In general, a Court cannot order execution unless it is satisfied (*i*) that the petitioner has a right to execute; (*ii*) that the judgment-debtor is liable to satisfy the decree; (*iii*) that the decree is executable; and (*iv*) that it is not barred by limitation. If therefore an executing Court orders execution to proceed it must be presumed to have held that all these conditions are satisfied. If a judgment-debtor with due notice of the proceedings fails to raise any objection on any of these grounds it must be held by the principle of constructive *res judicata* that his failure to do so has the same legal effect as if it had been raised and decided against him. The mere fact that the sum for which the decree is sought to be executed is not the correct amount due by the judgment-debtor to the decree-holder would not prevent execution from proceeding, and so the failure of a judgment-debtor to dispute at the

Bapanna v. Vengayya. — Horwill, J.

first opportunity the correctness of the figure would not bar him by the principle of constructive *res judicata* from raising that point in subsequent proceedings or at some later stage of the same proceedings. The whole question of the operation of the principle of constructive *res judicata* to execution proceedings has been very carefully discussed by Pakenham Walsh, J., in *Ulaganatha* v. *Alagappa*[1] and in *Azhagappa Chetti* v. *Ramanathan Chettiar*[2]. In *Azhagappa Chetti* v. *Ramanathan Chettiar*[2] he says:

> "There is ample authority for instance that where execution is taken out for an amount greater than that mentioned in the decree, failure to appear by the defendant would not act as *res judicata* and prevent him from showing in subsequent proceedings that that amount is not due".

Pakenham Walsh, J., also refers to *Kalyan Singh* v. *Jagan Prasad*[3], which is a decision to the same effect. We have also seen an unreported judgment, C.M.S.A. No. 2 of 1929, also by Pakenham Walsh, J., in which it was sought to weaken the effect of the words above quoted by referring to certain other expressions used in the same judgment, from which it might be argued that the above quoted principle was of limited application. The learned Judge repelled this argument and held that it was of general application and would apply to all cases where the judgment-debtor failed to object to the amount set out in the execution petition.

So far the earlier execution petition is concerned, Ex. B, E.A. No. 913 of 1926, it is clear that the judgment-debtor could not effectively put forward the plea of payment because the Court could not take account of any such payment. His failure to raise a point that could not in any way help him could not subject him to the bar of *res judicata*. As pointed out earlier, it is only points that if raised successfully would have modified the orders of the Court that can possibly operate as *res judicata*. The learned counsel for the appellant claims to have a stronger case with regard to the conduct of the judgment-debtor at the time of the originating of the proceedings in 1929; for as Ex. A, read with the transfer deed, amounts to a certification, then if the judgment-debtor had drawn the attention of the Court to the fact that the decree-holder admitted the payment, satisfaction for the uncertified payment would

---

1. A.I.R. 1929 Mad. 903. 2. (1932) 64 M.L.J. 629 at 636.
3. (1915) I.L.R. 37 All. 589.

presumably have been recorded. Even here however the principle of constructive *res judicata* would not apply, because the judgment-debtor could not have influenced the conduct of the Court in those proceedings. Some amount still remained due under the decree, even though full credit had been given for all the payments. The Court was therefore bound to acknowledge the right of the appellant to execute the decree, and, as the property against which the decree had to be executed was situated within the limits of another Court, to transfer the decree. The judgment-debtor was not therefore precluded by the principle of constructive *res judicata* from raising the plea of payment at a later stage in those proceedings, after the decree had been transferred.

The Letters Patent Appeal therefore fails and is dismissed with costs.

S. V. V. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VARADACHARIAR AND MR. JUSTICE MOCKETT.

Sri Rajah Tyada Pusapati Simhadriraju Dakshinakavata Dugarajulum Garu and another .. *Appellants** (*Defendants 1 and 2*)

v.

The Unlimited Aryan Bank of Vizagapatam represented by the Official Liquidator, M.R.Ry. Nishtala Bhaghavannulu Pantulu, *Vide* Order dated 8th January, 1929, on C.M.P. No. 3358 of 1928, and others .. *Respondents* (*Plaintiffs 1 and 2 and Defendants 3 to 6 and nil*).

Limitation Act (IX of 1908), S. 14—Mortgage suit—Suit in ordinary Civil Court—Properties situate outside in Agency jurisdiction—Decree for sale of all properties—Execution of—Number of execution petitions—Later decision holding decree so far as directed sale of properties in Agency area illegal—Subsequent suit in Agency Court—Time taken in suit stage and execution stage—If whole period deductible—' Civil proceeding '—Meaning of.

---

* Appeal No. 289 of 1926. 6th August, 1936.

Sri Rajah Dugarajulum Garu v. Unlimited Aryan Bank of Vizagapatam.

The principle of S. 14 of the Limitation Act is that if and so long as a person has been *bona fide* and with due diligence seeking the relief that he is entitled to in a Court which he believed to be a Court competent to grant him that relief, he ought not to be penalised for having instituted that action in the wrong Court. The reason of the rule applies equally to the steps taken by him after the decree as to steps taken by him prior to the decree. A party is seeking the relief that he is entitled to as much in the execution stage as during the pre-decree stage and in a mortgage suit, the relief that the mortgagee is entitled to is the sale of the property and till that has been carried out, all steps taken by him, provided they were taken with due diligence and in a Court which he *bona fide* believed to be the Court competent to grant him that relief, may legitimately be held to be steps taken in another " civil proceeding " within the meaning of S. 14.

A suit was brought on 17th January, 1907, in the Subordinate Judge's Court at Vizagapatam, to which the Civil Procedure Code applied on a mortgage securing properties situate both within that Court's jurisdiction as also in the Agency Tracts, to which the Code did not apply. A decree was obtained in 1911 directing sale of all the properties and a number of execution petitions filed between 1911 and 1918 in that Court, in the *bona fide* belief that it had jurisdiction to entertain them, all proved infructuous. In 1923 the properties situate in that Court's regular jurisdiction were sold but the decree was not satisfied thereby. It was found that the Court which passed the decree had, as a result of 42 Mad. 813, no jurisdiction to take cognisance of the decree in so far as it directed sale of the property situate in the Agency Tracts. Thereupon the mortgagee filed a suit in the Agency Court for recovery of the balance due under the mortgage.

Held, that in computing the period of limitation for the suit, the plaintiff is entitled to deduct not only the period from the date of the institution of the suit to the date of the decree but also the period during which the decree obtained by him was *bona fide* sought to be executed.

Appeal against the decree of the Court of the Agency Additional District Judge of Waltair in O.S. No. 95 of 1923.

D. Ramaswami Aiyangar for *C. S. Venkatachariar* for Appellants.

Y. Suryanarayana for Respondents.

The judgment of the Court was delivered by

Varadachariar, J.

Varadachariar, J.—This is an appeal against the decree in a mortgage suit filed in the Court of the Agency District Judge of Vizagapatam and the only point pressed before us is one of limitation.

This suit became necessary by reason of the rule laid down by the Privy Council in *Ramabhadra Raju Bahadur* v. *Maharaja of Jeypore*[1] that where a mortgage comprises property situate within the jurisdiction of the ordinary civil Courts in British India and also property situate in the Agency Tracts

1. (1919) 37 M.L.J. 11 : L.R. 46 I.A. 151 : I.L.R. 42 Mad. 813 (P.C.).

which are subject to the special jurisdiction of the Agent under Madras Act XXIV of 1839, the ordinary Civil Courts have no jurisdiction to take cognisance of the suit so far as it relates to the property situate within the Agency tracts. In the present case the two mortgages executed in November, 1895 and May, 1897, respectively, comprised properties partly situate in the Vizagapatam District proper and partly in the Vizagapatam Agency. The date fixed for payment was the 29th November, 1901; and within six years of that date, an action was commenced in the Subordinate Judge's Court of Vizagapatam for relief in respect of both sets of properties. A decree *nisi* followed in due course and also a final decree. Between February, 1911 and July, 1918, several applications for the execution of the decree were presented to and entertained by the Subordinate Judge of Vizagapatam but these attempts at realisation of the decree proved infructuous either for want of bidders or for other reasons not attributable to the default of the decree-holder. In July, 1918, the Subordinate Judge of Vizagapatam passed an order proclaiming for sale the properties situate within his jurisdiction and proposing to transfer the matter to the Agent so far as the properties within the jurisdiction of the Agent had to be sold. On the next application, however, which was made after the judgment of the Privy Council in *Ramabhadra Raju Bahadur* v. *Maharajah of Jeypore*[1], had been reported, he held that this part of the decree was futile and there was accordingly nothing to transfer to the Agent. It appears from the record that the properties situate in the regular jurisdiction were actually sold only some time in January, 1923; and as the amount then realised fell far short of the amount due on foot of the mortgage decrees, this suit was instituted in the Agency Court in October, 1923.

On the facts above stated, the question arises whether the plaintiffs are by reason of S. 14 of the Limitation Act entitled to deduct the period during which the decree obtained by them in the Subordinate Judge's Court of Vizagapatam was sought to be executed and if so on what basis the period of such deduction is to be calculated. No question has been raised as to their right to deduct the period between the institution of the suit and the date of the decree. The learned Agency

1. (1919) 37 M.L.J. 11: L.R. 46 I.A. 151: I.L.R. 42 Mad. 813 (P.C.).

Sri Rajah Dugarajulum Garu v. Unlimited Aryan Bank of Vizagapatam. — Varadachariar, J.

District Judge has held that the plaintiffs are entitled to deduction of the whole period from 17th August, 1907 (the date when the first suit was instituted) to January, 1920, when he thought the plaintiffs must be deemed to have become aware of the pronouncement of their Lordships of the Judicial Committee. It has not been contended before us that if during this period the plaintiffs could be held to have "been prosecuting another civil proceeding" within the meaning of S. 14 of the Limitation Act, they are nevertheless disentitled to the benefit of that section by reason of any lack of *bona fides* or due diligence on their part. It has been argued only as a point of law, first, that proceedings in execution of the decree in one suit are not within the contemplation of S. 14 when calculating the period of limitation for the institution of another suit and, secondly, that if the period occupied by the proceedings in execution could be deducted at all, it must be calculated only with reference to the time during which each execution application presented by the plaintiffs was pending and not by taking into account the interval between the dismissal of one execution application and the presentation of another. The answer to both these arguments seems to us to depend upon the true interpretation of the expression "prosecuting another civil proceeding".

The legislature has not, for purposes of computation, drawn any distinction in the first clause of S. 14 between the suit stage and later stages in execution, though for purposes of initiation of proceedings, a distinction has been made between a *suit* dealt with by the first clause of S. 14 and an *application* provided for in the second clause. This latter distinction relates to the suit or application in respect of which the question of limitation arises and not to the prior proceeding in respect of which deduction is claimed. The concluding words of the first clause of S. 14 no doubt provide that the previous proceeding should be founded upon the same cause of action as the later. And it is also true that so far as proceedings in execution following upon a decree are concerned, there is no question of their being founded upon a particular 'cause of action'; it is the suit in which the decree was passed that must be looked to, for determining the identity of the causes of action between the two suits. It seems to us that if the two suits are founded on the same cause of action, the fact that "no cause of action" can be predicated in respect of proceedings in execution is no

reason for holding that the time *bona fide* but infructuously taken in executing the prior decree should not be deducted under S. 14.

In determining the true scope of the indulgence allowed by S. 14 (1) of the Limitation Act, we think the Court may well bear in mind the principle applied in cases arising under S. 52 of the Transfer of Property Act, especially as the wording of that section (prior to its recent amendment) was practically identical with the language employed in S. 14 of the Limitation Act. Till 1929, its language was:

"That *during the active prosecution* of a contentious *suit or proceeding* in which any right to immovable property is in question the property cannot be transferred by any party to the suit so as to affect the rights of any other party to the suit under the decree made in the suit".

The question was frequently raised whether, for the purpose of S. 52, the *lis* continued only up to the date of the decree in a mortgage suit or up to the realisation of the mortgage decree by proceedings in execution; and the preponderance of authority was certainly in favour of the view that the *lis* continued up to the realisation of the mortgage decree by proceedings in execution. (Cf. *Surjiram Marwari* v. *Barhamdeo Persad*[1], *Ghanshyam Das* v. *Ragho Singh*[2], *Ramaswami Aiyangar* v. *Govinda Aiyar*[3] and *Abdul Muhammad Rowther* v. *Seethalakshmi Ammal*[4].) This principle has now received legislative recognition in the explanation added to S. 52 by the amending Act of 1929. It has been suggested that S. 52 of the Transfer of Property Act is not a provision in *pari materia* with S.14 of the Limitation Act and the analogy therefore is not true. The purport of the two provisions is no doubt different but the underlying policy seems to us to be the same in both cases. The principle of S. 14 of the Limitation Act is that if and so long as a person has been *bona fide* and with due diligence seeking the relief that he was entitled to in a Court which he believed to be a Court competent to grant him that relief, he ought not to be penalised for having instituted that action in the wrong Court. The reason of the rule seems to us equally to apply to the steps taken by him after the decree as to the steps taken by him prior to the decree. The fact that for processual purposes the Code makes a distinction between steps prior to the decree and steps subsequent to the decree

---

1. (1905) 2 C.L.J. 288 at 300.
2. (1930) I.L.R. 10 Pat. 234.
3. (1916) 31 M.L.J. 839.
4. (1930) 130 I.C. 666.

Sri Rajah Dugarajulum Garu *v.* Unlimited Aryan Bank of Vizagapatam.

Varadachariar, J.

does not affect the underlying principle of S. 14 of the Limitation Act. A party is seeking the relief that he was entitled to as much in the execution stage as during the pre-decree stage; and in a mortgage suit, the relief that he is entitled to is the sale of the property and till that has been carried out, all steps taken by him, provided they were taken with due diligence and in a Court which he *bona fide* believed to be the Court competent to grant him that relief, may legitimately be held to be steps taken in another 'civil proceeding' within the meaning of S. 14. That is the reason why in the earlier part of cl. 1 of S. 14 the Legislature has advisedly used the expression 'civil proceeding' and does not use the word 'suit'. The section specifically refers to the possibility of proceedings being taken in the Court of first instance or in the Court of appeal; this obviously rests on the theory that an appeal is merely a continuation of the proceedings in the first Court. No express reference has been made to proceedings in execution, apparently because under the law proceedings in execution have to be taken in the Court of first instance. We are accordingly of opinion that both the points urged on behalf of the appellants must be held to be untenable. In this view, it is unnecessary to examine another possible line of argument that notwithstanding the formal existence of *several* execution petitions in this case, they must all be regarded as a *single* proceeding in execution and the so-called 'dismissal' must only be regarded as disposals for statistical purposes because the earlier petitions did not prove effective and their dismissal was not attributable to any default on the plaintiff's part. It is sufficient to say that on this line of reasoning, the question of *intervals* between the dismissal of one petition and the presentation of another will not arise.

Reliance was placed by Mr. Ramaswami Aiyangar (on behalf of the appellants) on an unreported judgment of Jackson, J., in C. M. S. A. No. 76 of 1923 and another judgment of the same learned Judge in *Koganti Veerayya* v. *Narra Sreesilam*[1]. The judgment in the former case was reversed in Letters Patent Appeal on another point. We do not therefore have the opinion of the Appellate Court on the point under S. 14 of the Limitation Act. The question arose before

1. (1927) 110 I.C. 47.

Sri Rajah Dugarajulum Garu *v.* Unlimited Aryan Bank of Vizagapatam.

Varadachariar, J.

Jackson, J., with reference to the successive stages in execution of the same decree. Some intervening execution applications had according to the opinion of the learned Judges been presented to the wrong Court and the question he had to consider was on what basis the period of exclusion under S. 14 should be calculated in respect of a later application filed in the proper Court. That question had to be decided with reference to the language of cl. 2 of S. 14. Obviously on the facts of that case, the theory that a suit and proceedings in execution of the decree obtained therein altogether constitute a single proceeding when considered in relation to a *later suit* founded on the same cause of action as the prior suit, cannot apply. The learned Judge had to decide a point of limitation with reference to different applications for execution presented in respect of the same decree. In such a case he was of opinion that each execution application should be treated as a proceeding by itself and it was only the period of actual pendency of each of such applications that could be taken into account under S. 14 in determining whether a later application for execution was in time or not. We do not think it necessary for the purpose of this case to differ from that view (Cf. *Maqbul Ahmad* v. *Onkar Pratab Narain Singh*[1]), because, in a case of that kind, the principle on which we have rested our present decision is obviously unavailable. The decision in *Koganti Veerayya* v. *Narra Sreesilam*[2] throws very little light on the question now under consideration; if anything, it is at variance with the appellants' contention in so far as it recognises that even the period between the passing of the decree in a suit and the filing of an appeal therefrom may in certain circumstances be deducted under S. 14 of the Limitation Act. Such a deduction is inconsistent with the appellants' contention that it is only the actual period between the presentation of a proceeding and the disposal of that particular proceeding that can be allowed under S. 14. Jackson, J., recognised the theory that provided the suit had been rightly initiated, the appeal is really a continuation thereof and for reasons we have already given we think the same principle ought to be applied to proceedings taken in the execution department for realisation of the decree.

1. (1935) 68 M.L.J. 665: L.R. 62 I.A. 80: I.L.R. 57 All. 242 (P.C.).

2. (1927) 110 I.C. 47.

Sri Rajah Dugarajulum Garu v. Unlimited Aryan Bank of Vizagapatam.

Varadachariar, J.

A point was suggested by Mr. Ramaswami Aiyangar that the Judge should not have taken January, 1920, as the date up to which the plaintiffs were entitled to deduction, because the Subordinate Judge's order dated 5th July, 1918, differentiated the properties within his jurisdiction from the properties in the Agency jurisdiction and no further proceedings were taken by the plaintiffs after that date for the sale of the properties in the Agency jurisdiction. We do not pause to examine the correctness of this argument, because even if it should be held that the plaintiffs were entitled to deduction of the time only up to the 5th July, 1918, the present suit would nevertheless be in time if they are entitled to exclude the period from 17th August, 1907 to 5th July, 1918.

It was brought to our notice that the lower Court has declared that the plaintiffs are entitled to proceed against the other family properties of the defendant not comprised in the mortgages. The plaintiffs will be entitled to such a decree only if the suit has been instituted within the time allowed by law for a personal decree. But it is clear from the dates—and it is not disputed on the other side—that the personal remedy on the bond had become barred before the institution of this suit. That portion of the decree which relates to the liability of the other family properties of the defendants must accordingly be omitted. Subject to this variation, the decree of the lower Court is confirmed and the appeal is dismissed with costs. The appellants will pay the court-fee payable on the memorandum of appeal.

S. V. V. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW.

Ramaswamy Aiyar .. *Petitioner** (*Accused*).

Ramaswamy Aiyar, *In re.*

Town Nuisance Act (1889), S. 3, sub-S. (5)—Seller of gramophone records—Playing gramophone for a prospective buyer inside the shop—Crowd collecting outside—If playing gramophone in the circumstances, an offence.

Where a gramophone records seller played his records on the gramophone inside his shop for the benefit of a prospective buyer and there was nothing to show that he wilfully did it in order to cause obstruction in the street outside, he cannot be convicted of wilfully causing obstruction in a public street within the meaning of S. 3, sub-S. (5) of the Town Nuisance Act, 1889, merely because the playing attracted a crowd outside the shop and thereby caused obstruction.

---

* Cr. R. C. No. 707 of 1936. 18th January, 1937.
Cr. R. P. No. 659 of 1936.

Ramaswamy Aiyar, *In re.*

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the First Class Bench Magistrates, Madura Town, in S. C. No. 7637 of 1936.

O. V. Baluswamy for Petitioner.

The Public Prosecutor on behalf of the Crown.

The Court made the following

ORDER.—The petitioner in this case is a seller of a gramophone records in Madura Town. He has been convicted under S. 3, sub-S. 5 of the Town Nuisance Act of 1889, the act alleged against him being that he was having some gramophone records played inside his shop which attracted a crowd in the street outside and thereby caused obstruction. This statement of the case is enough to show that there can be no justification for the conviction. S. 3, sub-S. 5 clearly shows that it is only when wilful obstruction is caused, in any public street, road, thoroughfare or place of public resort that an offence is committed. In this particular case it is clear that there was no act done by the accused in any public street, road, thoroughfare or place of public resort. What he did was inside his own shop and it would also appear that he had the records played on the gramophone for the benefit of a prospective buyer and there is nothing to show that he wilfully did it in order to cause obstruction in the street outside. In an almost similar case Criminal Revision Case No. 476 of 1935 King, J., held that the conviction under S. 3, sub-S. 5 of the Act cannot stand. There the act alleged was the playing of gramophone music inside the accused's house attracting a crowd in the street in front of his house. This is a case in which there should have been no charge by the police and certainly no conviction by the Magistrates. It should have been obvious that no offence had been committed and it is astonishing to find the police charging the accused and the Magistrate convicting the accused in respect of an act which cannot possibly be an offence. The accused had done nothing criminal and yet he has been harassed by a prosecution and a trial which underwent 6 or 7 adjournments and put to considerable vexation and expenses. The Magistrates have thought it fit to observe that the accused " could have politely given his name " to the Sub-Inspector when he questioned him about the matter and " avoided all the sensation." The Bench Magistrates must know that their

Ramaswamy Aiyar, *In re.*

duty lies in administering the law as it stands, and that in the performance of this duty they should not allow their minds to be diverted by irrelevant considerations such as want of politeness on the part of the accused in his behaviour towards the Sub-Inspector of Police. The case discloses a state of affairs which is very disquieting and it is to be hoped that these words of mine will prevent such harassment of innocent persons in future. The conviction and the sentence are set aside and the accused is acquitted; the fine, if paid, must be refunded.

S. V. V. — *Conviction and Sentence set aside.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Fort William in Bengal.]

PRESENT:—LORD ALNESS, SIR SHADI LAL AND SIR GEORGE RANKIN.

Kalyanji Vithaldas and others .. *Appellants**

v.

The Commissioner of Income-tax, Bengal .. *Respondent.*

P.C. Kalyanji Vithaldas *v.* Commissioner of Income-tax, Bengal.

Income-tax Act (XI of 1922), S. 55—"Hindu undivided family"—Family consisting of male coparcener, his wife and daughters—Mode of levying super-tax—Coparcener receiving profits as partner—Absence of intention to throw income into common stock—Liability for super-tax.

Under S. 3 or S. 55 of the Income-tax Act, income is not to be attributed to any one of the five classes of persons mentioned by any loose or extended interpretation of the words but only where the application of the words is warranted by their ordinary legal meaning. It is not proper to read the phrase " Hindu undivided family " in S. 55 as meaning the same thing as " Hindu coparcenary."

Held, that it is not correct to hold that property which a man has obtained from his father belongs to a Hindu undivided family by reason of his having a wife and daughters and that in such a case the income from the property is chargeable to super-tax as the income of an individual.

Where a member of a Hindu undivided family is a partner in a firm in his individual capacity the income from the firm is his separate and self-acquired property, and when it has not been thrown into the common stock such income is assessable to super-tax under S. 55 of the Income-tax Act as the income of an individual.

Decision of the Calcutta High Court affirmed on other grounds.

Consolidated appeals under S. 66-A (2) of the Indian Income-tax Act, 1922 (XI of 1922), from a judgment of the High Court of Judicature delivered on 13th December, 1934,

* P. C. Appeals Nos. 24 to 29 of 1936. 30th November, 1936.

P.C.

Kalyanji Vithaldas v. Commissioner of Income-tax, Bengal.

under S. 66 (5) of the Act upon a case stated by the Commissioner of Income-tax, Bengal, under S. 66 (2) of the Act.

These six appeals raised the question whether the six appellants are liable to be assessed for the assessment year 1931-32 to super-tax individually on the scale applicable to individuals, or as Hindu undivided families applicable thereto through the appellants as representing their respective families. The actual questions finally referred by the Commissioner were:—(1) Whether the family of the assessee as it now stands is a Hindu undivided family within the meaning of the Indian Income-tax Act? (2) If the first question be answered in the affirmative, whether in the circumstances recorded in the case the income in question should be treated as income of that family and assessed as such?

The High Court answered the first question in the negative and held that the second question did not therefore arise. The appellants were Hindus governed by Mitakshara law and each of them lived with their respective families which included in some cases both males and females and in some cases females only; no division had taken place in such families, and it follows that such families were undivided Hindu families. The question arising in this appeal is whether the words "Hindu undivided family" in the Income-tax Act should be construed as meaning something different from what they mean in ordinary Hindu Law and as signifying only a Hindu family containing several adult coparceners who have the right to obtain a partition and have not done so, but have chosen to keep their property in a condition of jointness.

De Gruyther, K.C. and *L. P. E. Pugh* for Appellants.—The question that arises here is what is an undivided Hindu family within the meaning of the Income-tax Act, 1922. The question is whether the Hindu undivided family is limited to the coparcenary or not. In this case the view of the Calcutta High Court is that it is only the coparcenary that falls within the definition. In Madras and Lahore the view has been taken that it covers the whole family, and that a Hindu undivided family means the whole family without any limitations to the coparcenary. *Vedathanni* v. *Commissioner of Income-tax*[1] establishes that for a "Hindu undivided family" it is not necessary to have coparceners. The decision as I read it, amounts to definitely saying this, that where you have one owner, and persons claiming maintenance, that is, a Hindu undivided family, and has got to be taxed as a Hindu undivided family, and therefore any person who is a member of the family, and draws some money out is not liable to be taxed separately therefor. The

1. (1932) 63 M.L.J. 542: I.L.R. 56 Mad. 1 (F.B.).

P.C.

Kalyanji Vithaldas *v.* Commissioner of Income-tax, Bengal.

proposition decided by *Vedathanni* v. *Commissioner of Income-tax*[1] is that in order to constitute a Hindu undivided family it is not necessary to have two male members within the meaning of the Act. The proposition in which *Vedathanni* v. *Commissioner of Income-tax*[1] deals is that the word Hindu undivided family can cover a case of one male member of the family with female members claiming maintenance and it is not necessary that you should have two coparceners. *Krishan Kishore* v. *Commissioner of Income-tax*[2] decides that to constitute a Hindu undivided family within the meaning of this Act it is not essential that there should be anybody who could have a claim to partition. In *Commissioner of Income-tax* v. *Laxminarayan*[3] the question was whether a sole member having his wife and mother living with him constitute a Hindu undivided family within the meaning of the Act.

Refers to Mayne on Hindu Law, 9th Ed., p. 344 and *Janakiram Chetty* v. *Nagamony Mudaliar*[4]. It has been held in Calcutta since *Muddun Gopal Thakoor* v. *Ram Buksh Pandey*[5] that the property which a man gets as a gift from his father is ancestral property.

Lord Alness.—In the judgment under appeal it has been held that a Hindu undivided family is inter-changeable with coparcenary. In the authority you have cited it is held that this is contrary to the principles of Hindu Law. We must decide which of these two judgments is right,—they cannot both stand.

Counsel refers to Mayne's Hindu Law, 9th Ed., pp. 343, 347 and para. 271.

Sir G. Rankin.—Assuming a Hindu undivided family consisting of everbody descended from a common ancestor, did you hear of such a body having a profit? That is my difficulty.

Lord Alness.—There seems to have been no practical difficulty in working the Statute—the first case is after ten years.

Counsel refers to N. Rajagopala Chari's Law of Income-tax (1931), p. 32. The question has arisen because if you tax in one way you are liable to pay super-tax, and if in another way you are not. The authorities establish that where you have a joint undivided Hindu family the mere fact that you have only one male member in the family although there are females does not prevent that family from still being a Hindu undivided family within the meaning of the Income-tax Act. The following authorities establish the proposition that if a man dies intestate then under the

1. (1932) 63 M.L.J. 542: I.L.R. 56 Mad. 1 (F.B.).
2. (1932) I.L.R. 14 Lah. 255.
3. (1935) I.L.R. 59 Bom. 618.
4. (1925) 50 M.L.J. 413: I.L.R. 49 Mad. 98.
5. (1864) 6 W.R. 71.

P.C.

Kalyanji Vithaldas *v.* Commissioner of Income-tax, Bengal.

Mitakshara, his sons, grandsons and great grandsons succeed to his joint undivided property. If the father does not allow them to succeed on an intestacy but makes a gift to them in his lifetime, or devises it to them by will the property, when it comes to the sons, who would have taken under an intestacy, is in exactly the same position, and with the same limitations, as if there had been such an intestacy. Refers to *Muddun Gopal Thakoor* v. *Ram Buksh Pandey*[1] and *Hazari Mall Babu* v. *Abaninath Adhurjya*[2]. This view has never been dissented from on the Calcutta side. Madras has followed Calcutta. See *Janakiram Chetty* v. *Nagamony Mudaliar*[3]. On the other hand Allahabad and Bombay have taken a different view, see *Lal Ram Singh* v. *Deputy Commissioner*[4] Oudh followed Allahabad. The result for the present purpose is that *T* and *S*, the two sons of *M* would hold this property as undivided property, unless the fact that they did not have a son at this particular assessment prevents the right from accruing. The next year they did have sons, and I do ask you to indicate whether the existence of the sons is to make the family a divided family, or whether it is to be only in a state of fluctuation for the purposes of the Income-tax Acts. In my submissions the words "joint undivided family" are specially meant in a very large sense and if it were intended to qualify it in any way it was the duty of the legislature to make it perfectly plain that it could not be read as other than a coparcenary.

Pugh followed and referred to Sundaram's Law of Income-tax in India, 4th Ed., p. 188. *Rampershad* v. *Sheochurn Doss*[5], *Inland Revenue Commissioners* v. *Duke of Westminster*[6] and *Sri Raghunatha* v. *Sri Brozo Kishoro*[7].

A. M. Dunne, K.C. and *E.L. Norton* for Respondent.—In the first place, there is nothing to override the finding of fact of the Commissioner or mix up that finding of fact with an inference as a matter of law to say that the finding is wrong. On the position of Dayabaga family, *see* Mulla's Hindu Law, 8th Ed., p. 323. The family can only be a unit for taxation if it possessed an income, and if it possessed an income it could only be owned in a Hindu family by those who are entitled to partition it, and those are the coparceners and it cannot be that large body which Mayne describes as "a fringe on the real coparceners" in a Hindu family who would have rights of maintenance. Beaumont, C.J., in *Commissioner of*

1. (1864) 6 W.R. 71.
2. (1912) 17 C.W.N. 280 at 284, 285.
3. (1925) 50 M.L.J. 413: I.L.R. 49 Mad. 98.
4. (1923) 47 M.L.J. 260: L.R. 50 I.A. 265 at 274: I.L.R. 45 All. 596 (P.C.).
5. (1866) 10 M.I.A. 490 at 505.
6. (1936) A.C. 1 at 16.
7. (1876) L.R. 3 I.A. 154 at 191.

P.C.

Kalyanji Vithaldas *v.* Commissioner of Income-tax, Bengal.

Income-tax v. *Laxminarayan*[1] accepts the Madras case as covering the case before him which it did not. We are dealing with direct taxation of the person to be assessed. The Madras case was not dealing with that question. In the Income-tax Act a Hindu undivided family is interchangeable with coparcenary. One has to give a practical meaning to the Act. The Act is quite clear as to what was meant in regard to the duties of the Taxing authorities when you have got to tax income. The whole question is what did the legislature mean when they used this phrase "Hindu undivided family" as embodying a unit which in fact is a group of individuals, but treat it as a unit having, as a group, an income. [Refers to the Income-tax Act, Ss. 2 (9); 3; 14 (1); 15; 23; 25 (*a*); 38 (1); 55; 56; 58 (*a*); 58 (*b*) (*i*); and 63.] The words "Hindu undivided family" must be construed with reference to the Act and it is no use going into the Hindu Law and substituting other phrases which have in the course of time acquired a different meaning. If you look at the intention of the Act it is perfectly logical and perfectly clear that the legislature put in as the one test, that it must be a Hindu undivided family. That includes the coparcenary and the fringe of persons entitled to maintenance. The Act says what you have to find is an income coming to a Hindu undivided family and how can that possibly apply to anybody but the coparcenary. The fringe of persons entitled to maintenance has no right to divide. It is the income of the coparcenary and out of it that fringe is entitled to maintenance but the persons who are the owners of the income are the coparceners.

L. De Gruyther, K.C., replied.

30th November, 1936. Their Lordships' judgment was delivered by

Sir George Rankin.

SIR GEORGE RANKIN.—These six appeals concern the assessment to super-tax for the year 1931-2 of six of the seven partners of a firm known as Moolji Sicka & Co. This firm was for the year in question registered under S. 26-A of the Income-tax Act, the instrument of partnership being a Gujrati deed dated 11th September, 1930. Its business was that of dealers in Indian tobacco and cigarettes. The assessment to income-tax of the registered firm has been made in due course, and the present controversy is whether six of the partners should each be assessed to super-tax upon his share of the profits as an individual, or whether these six shares should each be assessed as income of a Hindu undivided family. The

1. (1935) I.L.R. 59 Bom. 618.

P.C.

Kalyanji Vithaldas *v.* Commissioner of Income-tax, Bengal.

Sir George Rankin.

rates of super-tax imposed by the relevant Finance Act are less in the case of a Hindu undivided family than in the case of an individual.

The problem has to be answered by applying to the facts of each case the language of S. 55 of the Act:

In addition to the income-tax charged for any year, there shall be charged, levied and paid for that year in respect of the total income of the previous year of any individual, Hindu undivided family, company, unregistered firm or other association of individuals, not being a registered firm, an additional duty of income-tax (in this Act referred to as super-tax) at the rate or rates laid down for that year by Act of the Indian Legislature.

Provided that, where the profits and gains of an unregistered firm have been assessed to super-tax, super-tax shall not be payable by an individual having a share in the firm in respect of the amount of such profits and gains which is proportionate to his share.

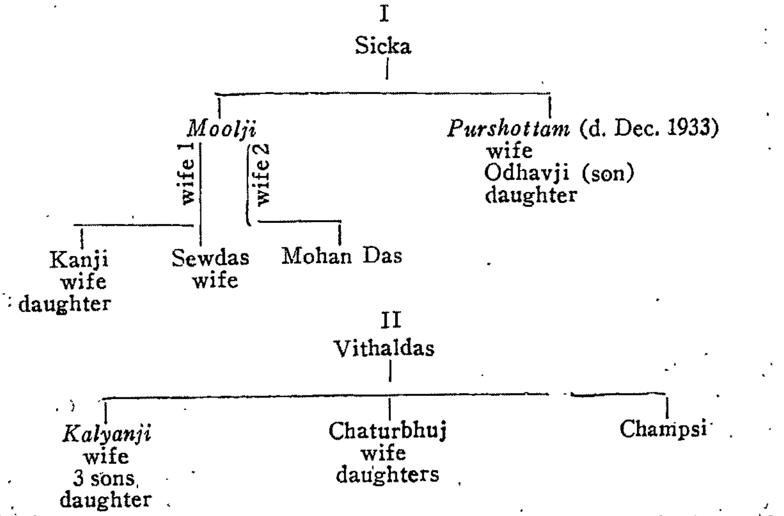
The two questions finally referred in each case by the Commissioner for the opinion of the High Court at Calcutta are as follows:

(1) Whether the family of the assessee, as it now stands, is a Hindu undivided family within the meaning of the Income-tax Act?

(2) If the first question be answered in the affirmative, whether in the circumstances recorded in this case the income in question should be treated as income of that family and assessed as such?

The High Court (Lort-Williams and Jack, JJ.) have in each case answered the first question in the negative and held that the second question did not arise.

The parties are governed by the Mitakshara and their pedigrees and families may be exhibited as under:



The history of the firm according to the Commissioner is that in or about 1912 the business was begun by Moolji and

P.C.

Kalyanji Vithaldas v. Commissioner of Income-tax, Bengal.

Sir George Rankin.

Purshottam (brothers who had separated) and Kalyanji (who is not related to either), and that in no case were ancestral funds employed for the purpose. That in 1919 Moolji made gifts of capital to each of his sons by his first wife—namely, Kanji and Sewdas. That at least since 1919 Moolji, Kanji and Sewdas have been separate from each other. That in 1919 on the terms of a Gujrati deed dated 1st May, Kanji (son of Moolji) and Chaturbuj (brother of Kalyanji) were taken into the partnership. That in 1930 Sewdas and Kalyanji's brother Champsi were taken into the firm on the terms of the deed of 11th September, 1930, already mentioned. That the interest of Kanji and of Sewdas was a gift from their father Moolji, and that of Chaturbhuj a gift from his brother Kalyanji. That in no case has it been proved that the individual partner has thrown his interest in the firm or his receipts therefrom into the common stock, that is, treated it as joint family property. Their Lordships are of opinion that the High Court was right in proceeding upon these findings of fact by the Commissioner.

From these facts it clearly appears, so far as Moolji, Purshottam and Kalyanji are concerned, that they are each members of a Hindu undivided family. Each has a son or sons from whom, so far as the evidence goes, he is not divided. But the income from the firm is clearly the separate and self-acquired property of the partner, and, as it has not been thrown into the common stock, it cannot be regarded as income of the family. It is the income of an individual and assessable to super-tax as such under S. 55 of the Act. In these three cases, therefore, the High Court should have answered the first question in the affirmative and the second question in the negative.

The interest of Chaturbhuj in the firm was obtained from his brother Kalyanji. It is self-acquired and not ancestral property: Chaturbhuj has no son, but even if he had, the son would have taken by birth no interest in the income now in question. The High Court might well have answered the second question in the negative and said of the first question that it did not arise.

In none of the four cases abovementioned, namely, those of Moolji, Purshottam, Kalyanji and Chaturbhuj—does the fact that the man has a wife and daughter (or more than one)

affect the result. The existence of a son does not make his father's self-acquired property family property or joint property. That the existence of a wife or daughter does so is untenable.

P.C.
Kalyanji Vithaldas v. Commissioner of Income-tax, Bengal.
Sir George Rankin.

There remain the cases of Kanji and Sewdas. Neither has a son, but, in the case of each, his interest in the firm was obtained by gift from his father Moolji. Without deciding the question which was left open in *Lal Ram Singh* v. *Deputy Commissioner*[1], their Lordships, for the purposes of the present case, will assume that their interest was ancestral property, so that, if either had had a son, the son would have taken an interest therein by birth. But, no son having been born, no such interest has arisen to qualify or diminish the interest given by Moolji to Kanji and to Sewdas. Does then the existence of a wife, or of a wife and daughter, make it income of a Hindu undivided family rather than income of the individual partner? Their Lordships think not. A man's wife and daughter are entitled to be maintained by him out of his separate property as well as out of property in which he has a coparcenary interest, but the mere existence of a wife or daughter does not make ancestral property joint. "Interest" is a word of wide and vague significance, and no doubt it might be used of a wife's or daughter's right to be maintained, which right accrues in the daughter's case on birth; but if the father's obligations are increased, his ownership is not divested, divided or impaired by marriage or the birth of a daughter. This is equally true of ancestral property belonging to himself alone as of self-acquired property. The cases of Kanji and of Sewdas can be disposed of by answering the second question in the negative.

The High Court approached the cases by considering first whether the assessee's family was a Hindu undivided family, and in the end left unanswered the question whether the income under assessment was the income of that family. This is due no doubt to the way in which the Commissioner had stated the questions. But, after all, if the relevant Hindu law *had* been that the income belonged, not to the assessee himself, but to the assessee his wife and daughter jointly, it is difficult to see how that association of individuals could have been refused the description "Hindu joint family". The phrase

1. (1923) 47 M.L.J. 260: L.R. 50 I.A. 265: I.L.R. 45 All. 596 (P.C.).

P.C.

Kalyanji Vithaldas *v.* Commissioner of Income-tax, Bengal.

Sir George Rankin.

"Hindu undivided family" is used in the statute with reference not to one school only of Hindu law, but to all schools; and their Lordships think it a mistake in method to begin by pasting over the wider phrase of Act the words "Hindu coparcenary"—all the more that it is not possible to say on the face of the Act that no female can be a member. The Bombay High Court, on the other hand, in *Laxminarayan's case*[1], having held that the assessee his wife and mother were a Hindu undivided family, arrived too readily at the conclusion that the income was the income of the family.

The phrase which has to be considered and applied to the facts is "the total income of the previous year of any individual, Hindu undivided family, company, unregistered firm or other association of individuals not being a registered firm". The words "income of" are simple words and are capable of wider or narrower meaning; but for the present purpose the Courts are concerned with them as they appear in an Income-tax Act; and under S. 3 or S. 55 income is not to be attributed to any one of the five classes of persons mentioned by any loose or extended interpretation of the words, but only where the application of the words is warranted by their ordinary legal meaning. The relevant meaning in the present cases is the ordinary meaning in Hindu law according to the Benares school. In an extra-legal sense, and even for some purposes of legal theory, ancestral property may perhaps be described, and usefully described, as family property; but it does not follow that in the eye of the Hindu law it belongs, save in certain circumstances, to the family as distinct from the individual. By reason of its origin a man's property may be liable to be divested wholly or in part on the happening of a particular event, or may be answerable for particular obligations, or may pass at his death in a particular way; but if, in spite of all such facts, his personal law regards him as the owner, the property as his property and the income therefrom as his income, it is chargeable to income-tax as his, that is, as the income of an individual. In their Lordships' view it would not be in consonance with ordinary notions or with a correct interpretation of the law of the Mitakshara, to hold that property which a man has obtained from his father belongs to a

1. (1935) I.L.R. 59 Bom. 618.

P.C.

Kalyanji Vithaldas v. Commissioner of Income-tax, Bengal.

Sir George Rankin.

Hindu undivided family by reason of his having a wife and daughters.

The result is that in the cases of Moolji, Purshottam and Kalyanji the first question stated by the Commissioner should be answered Yes and the second No. In the other cases the second question should be answered No and the first question need not be answered.

Upon the reported decisions cited during argument their Lordships will only observe that the decision in *Vedathanni's case*[1], does not cover the present question which arises under S. 55 of the Act, and that they take no exception to the result arrived at in the case of *Raja Bhunesh Pratap Narain Singh*[2], though they do not agree that a Hindu joint family necessarily consists of male members only. Their Lordships will not here deal with the case of an impartible estate held by the senior of several male members of a family, as to which there have been conflicting decisions in India (Cf. *Raja Shiva Prasad Singh* v. *Secretary of State*[3] and *Krishan Kishore's case*[4]).

They will humbly advise His Majesty that the appeals should be dismissed with costs.

Solicitors for Appellants: *Douglas Grant & Dold.*

Solicitors for Respondent: *Solicitor, India Office.*

R. C. C. *Appeals dismissed.*

B. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING.

Rathnammal *alias* Rajamani Ammal .. *Appellant** (*L. R. of deceased Plaintiff*).

v.

The Secretary of State for India in Council represented by the Collector of Coimbatore .. *Respondent* (*Defendant*).

Rathnammal v. Secretary of State for India in Council.

Madras Irrigation Cess Act (VII of 1865), S. 1 (b)—*Ryot liable to take water from a source for wet crop--His taking water throughout the year instead of the restricted supply he was entitled to for raising the wet crop—Interpretation of the word 'source' in proviso to S. 1—Penal assessment if proper.*

The appellant, a ryot, filed a suit against the Government for imposing penal rate on the ground that he had taken water without due authority from

1. (1932) 63 M.L.J. 542: I.L.R. 56 Mad. 1 (F.B.).
2. (1932) 6 I.T.C. 175.
3. (1924) 1 I.T.C. 384 at 388-9.
4. (1932) I.L.R. 14 Lah. 255.

* S. A. No. 146 of 1933. 18th December, 1936.

Rathnammal
v.
Secretary of
State for
India in
Council.

a source in addition to that which had been assigned by the Revenue authorities to his land. The question turned upon the interpretation of the proviso to S. 1 (*b*) of the Madras Irrigation Cess Act.

Held, that the appellant was entitled no doubt to the water of a particular channel being the source of irrigation to his lands. But his land had been assessed as a single wet crop land and the rate of assessment was calculated on the assumption that he would require water only for the normal length of time required for the growing of an ordinary wet crop and not for the crop which was actually grown and which would require water throughout the year. If he had actually taken a year's supply of water instead of a more restricted supply which would have been available to him during a few months, then he had been taking without due authority water from a source, which in essence was both different from and in addition to the source which had been assigned by the Revenue authorities for the irrigation of his land. Hence the assessment of penal rate was justifiable.

Krishna Row v. *The Collector of Kistna*, (1914) 26 M.L.J. 210, referred to.

Second appeal against the decree of the Court of the Subordinate Judge of Coimbatore in A. S. No. 7 of 1932 preferred against the decree of the Court of the District Munsiff of Tiruppur in O. S. No. 637 of 1930.

T. M. Krishnaswamy Aiyar and *K. S. Sankara Aiyar* for Appellant.

The Government Pleader (K. S. Krishnaswami Aiyangar) for Respondent.

The Court delivered the following

JUDGMENT.—This second appeal raises an interesting point with regard to the interpretation of the proviso to S. 1 (*b*) of the Madras Irrigation Cess Act of 1865. The appellant here is a ryot owning certain land which has been classified as single crop wet. He has however been growing upon this land certain crops which have remained upon the land throughout the whole fasli and have received water during that period. The Government accordingly assessed him to penal water rate on the ground that he has taken water without due authority from a source in addition to that which has been assigned by the Revenue authorities to his land. Both the Courts below have dismissed his suit and he has now appealed to the High Court. The proviso in question runs as follows:—

"No cess shall be leviable under this Act in respect of land held under ryotwari settlement, which is classified and assessed as wet, unless the same be irrigated by using without due authority water from any source hereinbefore mentioned and such source is different from or in addition to that which has been assigned by the Revenue authorities or adjudged by a competent Civil Court as the source of irrigation of such land".

The decision of the appeal would obviously turn mainly upon the definition of the word 'source'. It is argued for the

Rathnammal *v.* Secretary of State for India in Council.

appellant that 'source' can only mean some such body of water as a tank, or a channel, and that in so far as the appellant in this case is taking water not from any unauthorised tank or channel, it cannot be said that he is taking water from an unauthorised source. It is however clear that some more extended meaning than this must be given to the word 'source'. For, if source were to be confined to, for instance, a channel, then the Government would be precluded from laying down any regulations which would define the quantity of water, or proportion of the water flowing in that channel, or the time during which the water of that channel might be utilised. A case very similar in principle came before this Court in *Krishna Row* v. *The Collector of Kistna*[1]. There it appears that there were two pipes from which the water of a certain channel was taken to the lands of the ryot though the revenue authorities had authorised the ryot concerned in that case to take water through one only of those two pipes. The ryot however had taken water through both the pipes and it was held that the proviso to S. 1 (*b*) of the Madras Irrigation Cess Act applied to that case. Clearly of course in that case the ryot had taken water from the channel from which he was authorised to take it. What he had done was to take a larger quantity of water than the Government permitted him to do. That, in my opinion, is clearly the situation in the present case. No doubt the appellant is entitled to the water of this particular channel for his field. But his land has been assessed as a single crop wet land and the rate of assessment is calculated on the assumption that he will require water only for the normal length of time required for the growing of an ordinary wet crop and not for the crop which was actually grown and which would require water throughout the year. If he has actually taken a year's supply of water instead of a more restricted supply which would have been available to him during a few months, then it seems to me quite clear that he has been taking without due authority water from a source which is in essence both different from and in addition to the source which has been assigned by the Revenue authorities for the irrigation of his land. I would accordingly hold that the decision of the Courts below is correct and dismiss this appeal with costs.

Leave to appeal is granted.

K. C. ——— *Appeal dismissed.*

---

1. (1914) 26 M.L.J. 210.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATARAMANA RAO.

Viyathan Mahadevi styled Kozhikote Kishakke Kovilagath Valia Thamburatti (deceased) and another .. *Appellants* (L. R. of the Plaintiff nil)*

v.

Punnappale Koyimmar Kurikkal's son Aydross Kurikkal and another .. *Respondents (Defendants).*

Viyathan Mahadevi *v.* Aydross Kurikkal.

Malabar Compensation for Tenants' Improvements Act (I of 1900), S. 19—Clause in a lease providing for full value of trees cut by tenant—Cutting not an improvement or for improvements—Trees of spontaneous growth after lease—Cutting of—If landlord entitled to value of trees or only reasonable compensation.

A kychit executed by a tenant to the jenmi provided that if the tenant should cut trees such as veeti teak, jack, etc., from the parambas without obtaining the written consent of 'kovilagam', he should "be answerable for the costs of such trees and shall surrender the properties irrespective of the 12 years' term if the kovilagam demands it". The kovilagam was not in possession of the land demised for over 100 years. Trees between 10 and 20 years old which were of spontaneous growth after the demise to the tenant and which were tended and reared by the tenant were cut by him. It was found that the cutting was not in itself an act of improvement and was not for the purpose of building farm houses or making any other improvements on the holding within the meaning of the Malabar Compensation for Tenants' Improvements Act. In an action by the jenmi to recover the full value of the trees,

Held, that as in the case of trees planted by the tenant, so also in the case of trees of spontaneous growth grown after the demise to the tenant, a clause providing for the payment of the full value of the trees, is penal and contrary to the provisions of S. 19 of the Act as it is a fetter on the tenants' right to make improvements by protecting and maintaining them. The jenmi is only entitled to reasonable compensation.

Kelu Nair v. *Valia Thamburatti*, (1922) 16 L.W. 310 and S.A. No. 249 of 1929 dissented from.

Raja of Cochin v. *Kittunni Nair*, (1916) 32 M.L.J. 295: I.L.R. 40 Mad. 603 (F.B.), discussed.

Appeal against the decree of the Court of the Subordinate Judge of South Malabar at Calicut in A. S. No. 200 of 1930 (A. S. No. 324 of 1930, District Court) preferred against the decree of the Court of the District Munsif of Manjeri in O. S. No. 316 of 1929.

---

* S. A. No. 1853 of 1931. 20th November, 1936.

K. P. Ramakrishna Aiyar and *P. K. Manavikraman Raja* for Appellants.

N. R. Sesha Aiyar for Respondents.

The Court delivered the following

JUDGMENT.—The question in this second appeal is whether the plaintiff who is a jenmi is entitled to recover the value of certain trees cut by the defendant-tenant. The claim is made by virtue of a clause in the kychit Ex. A. The clause runs thus:

"If I cut trees such as veeti teak, jack, etc., from the parambas without obtaining the written consent of the kovilagam, I shall be answerable for the costs of such trees and shall surrender the properties irrespective of the 12 years' term if the kovilagam demands it".

The main defence is that the said clause is penal and unenforceable. It was found by the District Munsif that the kovilagam of the plaintiff was not in possession of the land demised for over 100 years and the trees which are cut were aged between 10 and 20 years. He further found that the trees were of spontaneous growth grown after the demise to the defendant, that they were tended and reared by the defendant and that they really constituted improvements within the meaning of the Malabar Compensation for Tenants' Improvements Act. It is not disputed by Mr. Ramakrishna Aiyar on behalf of the plaintiff that they would be improvements within the meaning of the Act. The District Munsif held that the cutting was for the purpose of making other improvements on the land demised and gave only nominal damages at the rate of 8 annas per tree. On appeal the learned Subordinate Judge was of the opinion that the clause contravened S. 19 of the Act, but gave one-fourth of the value of the trees as compensation to the plaintiff. He did not give a finding on the question whether the cutting of the trees was an improvement. In view of certain decisions of this Court I called for a finding on two questions, namely, (1) whether the cutting of the trees in question is itself an act of improvement within the meaning of the Malabar Compensation for Tenants' Improvements Act, and (2) whether the cutting of the trees was for the purpose of building farm houses or making any other improvements on the holding within the meaning of the Act. The learned Subordinate Judge answered both the questions in the negative. Mr. Ramakrishna Aiyar contends that the plaintiff is entitled to the full value of the improvements in view of the said findings

Viyathan Mahadevi v. Aydross Kurikkal.

and relies on two decisions of this Court one of Ramesam, J., reported in *Kelu Nair* v. *Valia Thamburatti*[1] and another of Walsh, J., in S. A. No. 249 of 1929. Those decisions do support him. But it is contended on behalf of the defendant by Mr. N. R. Sesha Aiyar that the said two decisions are opposed to the decision of the Full Bench in *Raja of Cochin* v. *Kittunni Nair*[2] and should not be followed. In *Raja of Cochin* v. *Kittunni Nair*[2] a similar claim was advanced. The suit therein was for the full value of the trees based upon a clause in the lease which is almost identical with the clause in question and ran thus:

"The teak, rosewood jack and such kinds of trees which now exist, and may in future be produced in the properties mentioned in the schedule, are not to be cut down and removed without the permission of the State and without paying the *kuttikanam*, but if they are so cut and removed, I am liable for paying up either the fine imposed by the State or the value of the trees".

It will thus be seen that the clause related to two sets of trees (1) trees which existed at the date of the lease and (2) trees which may be produced in future. Though the claim was made in the suit for the full value of the trees, in second appeal it was limited to the payment of kuttikanam fee. Even then the question was raised as to the legality of the kuttikanam fee and whether the provision was not obnoxious to the Tenants' Improvements Act. The learned Judges who made the order of reference were divided in their opinion. Coutts-Trotter, J., took the view that the landlord was not entitled to claim kuttikanam fee and he observed thus:

"I see no answer to the arguments that to make the tenant's right to carry out an improvement depend upon his making a payment to his landlord is of necessity to put a limitation upon that right".

Seshagiri Aiyar, J., took a different view. According to him the provision for the demand of a moderate fee would not limit or affect the right of a tenant to make improvements upon the property. But he was distinctly of opinion that the payment of damages that may be fixed by the landlord or the value of trees would undoubtedly be penal in its character. The question referred to the Full Bench was general, namely:

"Whether a provision in a Malabar lease that a tenant shall pay kuttikanam or some fee to his landlord in respect of trees cut down is contrary to the provisions of S. 19 of the Malabar Compensation for Tenants' Improvements Act".

---

1. (1922) 16 L.W. 310.
2. (1916) 32 M.L.J. 295: I.L.R. 40 Mad. 603 (F.B.).

The Full Bench dealt with the question on the footing that the cutting was not an improvement (*vide* Abdur Rahim, J. at p. 609 and Phillips, J. at p. 610). Wallis, C. J., thought that the payment of kuttikanam fee was not open to objection as limiting the tenant's rights to plant trees, still less his right to cut trees by way of clearance. He answered the reference thus:

"a stipulation in a Malabar lease for the payment of kuttikanam to the landlord in respect of trees cut down is not contrary to the provisions of S. 19 of the Act".

In this opinion both Oldfield and Srinivasa Aiyangar, JJ., concurred. Abdur Rahim, J., thought that even if the cutting was an improvement the payment demanded would not be unreasonable and can be allowed. Phillips, J., dealt with the question thus:

"If a tenant plants a tree he is not bound to cut it down before the end of the tenancy. If it is in existence at the end of the tenancy, he is entitled to compensation, but not otherwise, and if he chooses to enjoy the benefit of the tree by cutting it down during the tenancy, no question of compensation arises. . . . If the tenant cuts down a tree he gets the full value of it less the fee imposed, but as he need not cut down the tree the fee imposed can in no way prevent him from growing it except possibly when the fee is unreasonably large".

Having regard to the terms of the reference and the answer of the majority of the learned judges the ratio of the Full Bench decision appears to be that even in cases where the cutting of a tree is not an improvement, whether the trees were planted by the landlord or of spontaneous growth, it will be open to the landlord to charge a moderate fee and such a provision will not be obnoxious to S. 19 of the Act, but if the fee is unreasonably large, it would certainly contravene the provisions of the Act. But on a reference to the printed papers in the case I find that both the District Munsif and the District Judge in the Courts below dealt with that case on the footing that the trees cut were planted by the tenant. So it may be contended that the reference to the Full Bench and the answer given by them should be confined to the cases of trees planted by the tenant. No doubt the law is clear that in the case of trees planted by the tenant the property therein vests in the tenant but so far as the trees of spontaneous growth the law is not clear and the opinion seems to be divided and in *Narayani Amma* v. *Kunchukutti Amma*[1] the question was left open. But

1. (1916) 32 M.L.J. 541.

Viyathan Mahadevi *v.* Aydross Kurikkal.

the Act for the purpose of compensation treats both the trees planted by the tenant and the trees of spontaneous growth grown after the demise on the same footing. If in the one case, *i.e.*, in the case of planting of trees a clause which provides for the payment of the full value of trees would be contrary to the provisions of S. 19 on the ground that it would be a fetter on his right to plant trees and make improvements, I do not see any reason why the same principle should not apply to trees of spontaneous growth as it may be equally said that it would be a fetter on his right to protect and maintain them and thus make improvements within the meaning of the Act. It would seem to me apart from the question of ownership the same principle ought to govern both sets of trees in view of the fact that the principle of compensation provided in the Act has reference to the labour spent by the tenant in either rearing or protecting them in both cases. And thus any provision which would operate to prevent it will be a fetter on his right to make improvements within the meaning of the Act. In *Kelu Nair* v. *Valia Thamburatti*[1], Ramesam, J., observes:

> "Where the act of felling down the trees is an act of improvement the imposition of a small kuzhikanam fee does not contravene the provisions of S. 19 of the Act".

For this he relies on the Full Bench decision. He again observes:

> "If, on the other hand, the fee imposed is the full value of the trees, it does contravene the provisions of the Act. But if it is not an act of improvement the clause would not contravene the provisions of the Act".

and he relies on Phillips, J.'s remarks at p. 611. With great respect to the learned Judge I am unable to see how the Full Bench decision or the judgment of Phillips, J., is an authority for this latter proposition which the learned Judge lays down. The Full Bench proceeded on the footing that the cutting was not an improvement. Even then they considered the question whether kuttikanam fee was a reasonable fee or not. In fact the Full Bench decision is an authority for the position that at any rate in the case of trees planted by a tenant even if the cutting is not an improvement, a clause providing for payment of the full value of the trees would be penal but not a payment of a moderate fee. The observations of Phillips, J., are absolutely clear on the point. He in fact distinctly observes

1. (1922) 16 L.W. 310.

that if the fee is unreasonably large it might be penal. Walsh, J., makes a distinction between the trees of spontaneous growth and the trees planted by the tenant. He observed: Viyathan Mahadevi v. Aydross Kurikkal.

"It is not necessary to say whether such a contract with regard to trees grown by the tenant himself would be valid. In the present case, the trees are all of spontaneous growth".

And he then relies on the remarks of Phillips, J., as supporting his view that the tenant is entitled to payment of the full value of the trees. I have already shown what the view of Phillips, J., is. I do not see how Phillips, J., can be said to be laying down a principle in support of the view Walsh, J., was taking. I therefore respectfully dissent from the decisions in *Kelu Nair* v. *Valia Thamburatti*[1] and S. A. No. 249 of 1929 and hold that the provision for the payment of the full value of the trees in the kychit in question is penal and contrary to S. 19 of the Malabar Compensation for Tenants' Improvements Act. The plaintiff is entitled only to reasonable compensation and that awarded by the lower Court is reasonable. In the result the second appeal fails and is dismissed.

Mr. Ramakrishna Aiyar says that his client preferred the appeal in view of the said two decisions which took the view he contended for and therefore this is not a matter for allowing costs so far as this second appeal is concerned. I therefore direct each party to bear his own costs in this second appeal.

Leave granted. *Appeal dismissed.*

S. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATARAMANA RAO.

Balath Kunhi Raman and another .. *Petitioners** (*Plaintiffs*)

v.

Varayali Govindan and another .. *Respondents* (*Defendants*).

Limitation Act (IX of 1908), Sch. I, Arts. 7 and 102—Applicability—Cook employed in hotel—Suit for recovery of arrears of salary—Bar of limitation—Meaning of "household servant". Kunhi Raman v. Govindan.

The expression "household servant" in Art. 7 means a servant belonging to a household, that is, a family or domestic establishment and it is not the

---

1. (1922) 16 L.W. 310.

* C. R. P. No. 772 of 1935. 14th December, 1936.

Kunhi Raman v. Govindan.

nature of the service rendered by the servant but the place of employment, that is the determining factor.

Held, that a hotel cannot be said to be a "household" within the meaning of Art. 7 and that a suit by a cook employed in a hotel for recovery of arrears of salary is governed by Art. 102 and not by Art. 7 of the Limitation Act.

Bhavathradan v. *Rama*, (1883) I.L.R. 7 Mad. 99, relied on.

Petition under S. 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the principal District Munsiff of Tellicherry dated the 27th day of February 1935 and passed in S. C. S. No. 940 of 1934.

K. N. Kumaran for Petitioners.

K. Kuttikrishna Menon for Respondents.

The Court delivered the following

JUDGMENT.—This Civil Revision Petition arises out of a suit to recover a sum of Rs. 57-0-7 as and for arrears of salary due to the petitioner. She was employed as a cook on a monthly salary of Rs. 4 per mensem in a hotel which the first defendant was running at Tirur. The case for the plaintiffs is that at the instance of the second defendant she entered employment under the first defendant as a cook and both promised to pay her the salary agreed. The suit was instituted on 21st November, 1934, for the arrears due in respect of the period of her service, namely, 9th November, 1931 to 8th September, 1933. The learned District Munsiff of Tellicherry dismissed it on the ground that it was barred by limitation under Art. 7 of the Limitation Act. It is contended on behalf of the petitioner that the proper article applicable is Art. 102. Art. 7 runs thus:

"For the wages of a household servant, artisan or labourer not provided for by this schedule, Art. 4.	One year.	When the wages accrued due".

The question is, is the petitioner a "household servant" within the meaning of the article? If not, Art. 102 applies. It seems to me that the expression 'household servant' in Art. 7 means a servant belonging to a household, that is, a family or a domestic establishment and it is not the nature of the service rendered by the servant but the place of employment, that is, the determining factor. A hotel cannot be said to be a 'household' within the meaning of the said article though hotel may be a household in the sense that it may board and lodge people but the essential feature of a household, that is, a family is wanting. It is also a place of business where for consideration

Kunhi Raman v. Govindan.

food and drink are sold and persons are housed and lodged. In *Bhavathradan* v. *Ramal*[1], a person whose duties are to sweep and clean a temple, was held not to be a household servant because the temple is not a household though the same servant for doing similar service in a household will be a household servant. This case indicates that the emphasis has to be placed on the term household in the article and not on the nature of the service rendered by the servant. I am therefore of the opinion that Art. 102 will apply to the case and the suit is not barred by limitation. I therefore reverse the decree of the lower Court and allow the Civil Revision Petition by giving a decree in favour of the plaintiff for the amount claimed with interest at 6 per cent. from the date of the decree with costs both here and the Court below.

B. V. V. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING.

Maruthappa Servai and another .. *Appellants**

v.

Niraikulathan Servai and others .. *Respondents.*

Maruthappa Servai v. Niraikulathan Servai.

Hindu Law—Mortgage—Grandfather borrowing to assist in the prosecution of the murderer of a member of the family—If loan either for necessity or benefit to family—Grandsons, liability for—Pious obligation—Nature of decree to be passed.

Where a grandfather mortgages joint family property to pay an advocate who was engaged to assist the police in *prosecuting* a man accused of having murdered his son, it is not an item either of necessity or benefit to the family so as to legally bind the family. The result is that the mortgage as mortgage will bind only the executant's (grandfather's) share of the family property but as the debt is neither an illegal nor an immoral one, the grandsons will, by reason of the pious obligation theory, be liable to discharge it out of the assets of the family as have come or may come in their hands.

Second appeal against the decree of the Court of the Subordinate Judge of Tuticorin in A. S. No. 24 of 1931 preferred against the decree of the Court of the District Munsiff of Koilpatti in O. S. No. 340 of 1929.

K. Rajah Aiyar for Appellants.

S. Ramaswami Aiyar for Respondents.

The Court delivered the following

JUDGMENT. This is a suit brought upon a mortgage-deed of 1920 by the mortgagee to enforce his mortgage. The

1. (1883) I.L.R. 7 Mad. 99.

* S. A. No. 106 of 1933. 26th November, 1936.

Maruthappa Servai v. Nirai-kulathan Servai.

mortgagor is the first defendant. The other defendants are his two grandsons, defendants 2 and 3. In the mortgage-deed the property is described as belonging to the mortgagor himself but it has been found by the Court of first instance that the property mortgaged was really the joint family property of the mortgagor and his grandsons. The purpose for which the money was borrowed was recited to be to pay an advocate who was engaged to assist the police in prosecuting a man accused of having murdered the first defendant's son, who was also the father of defendants 2 and 3. Both the Courts have held that this was a purpose binding upon the joint family and have given a mortgage decree over the whole of the property, that is to say, including the shares of defendants 2 and 3 as well as the share of the first defendant.

It is contended in this second appeal that this finding is wrong and that the mortgage as a mortgage can be valid only as against the share of the first defendant. The learned Advocate for the respondent, however, argues that the question whether any particular sum of money had been borrowed for family necessity or purpose binding upon the family is a question of fact and that as both the lower Courts have given findings on this question, I am precluded from interfering with those findings in second appeal. I agree that in the main the question whether money had been borrowed for family purpose is a question of fact. I agree also that there is a finding in the present case that money was necessary if a pleader were to be engaged to assist the police, that is to say, that the money was not otherwise available. But it does not seem to me that either of the Courts below have definitely given any positive finding of fact on this point. They are clearly obsessed by the difficulty of the situation. In the ordinary sense of the word it is not necessary and never can be necessary to spend money in order to assist in the prosecution of a person accused of the murder of a member of one's family. To have that person convicted and even hanged can do the family no good; it cannot restore the murdered man to life; it cannot be said to affect the finances of the family or even its prestige. In any case the Courts below have not seriously faced this problem. The District Munsiff in giving his finding merely says that:

"In the absence of decided rulings either way I am inclined to hold that this is an item of expenditure which should bind the family. To hold otherwise would sometimes work grave hardship".

And the learned Subordinate Judge says as follows:—

"In the present instance the debt in question was incurred for the purpose of finding out and bringing to book the real offender, that is to say, for the vindication of justice. Such an object seems to me proper and lawful and the vindication of justice is as much a necessity as the defence of an accused member of a family".

It seems to me that that finding was given merely as a bare expression of opinion on the part of the learned Subordinate Judge. There is no attempt at showing by any kind of detailed discussion of the circumstances of the family how this benefit is derived or how this necessity arises. I do not, as I have said, consider that these findings thus hesitatingly expressed actually amount to findings of fact which preclude me from any interference in second appeal.

In support of the lower Court's decision I have been referred to two cases. The first is the one reported in *Anokh Singh* v. *Sapuran Singh*[1]. There money was borrowed in order to prosecute a case under S. 498, Indian Penal Code. The decision, however, that it was necessary to incur debts in order to prosecute for an offence under that section is not discussed at any length but is contained in a single sentence:

"Debts incurred for a litigation of this nature may in my opinion be reasonably regarded as necessary".

The other case is the one in *Krishna Aiyar* v. *Muthulakshmi Ammal*[2]. That is clearly distinguishable from the facts of the present case, for there money had been borrowed partly in order to recover title deeds and partly to defend a widow against an unfounded charge of having forged a bond. It has never been doubted that money spent in defending a member of a family in a criminal charge is a legal necessity. The question here obviously is whether money spent in assisting a particular prosecution which can bring no definite benefit to the family at all but is undertaken either to satisfy feelings of revenge or feelings of prestige should be considered as legally binding upon all the members of the family. I do not think I can derive very much assistance from either of these two cases. It seems that the matter is one on which authority is practically wanting and one of first impression and taking the words 'necessity' and 'family benefit' in their ordinary sense it seems impossible to hold that the debts incurred in this

---

1. (1923) 79 I.C. 980.
2. (1933) 66 M.L.J. 342.

Maruthappa Servai *v.* Nirai-kulathan Servai.

instance can be binding upon the family. I would therefore set aside the findings of the lower Courts upon this point.

The result, however, is not to dismiss the plaintiff's suit altogether. He can still have a mortgage decree against the first defendant's share of the family property; and as against defendants 2 and 3 since the debt incurred is clearly neither illegal nor immoral and they are bound by the doctrine of pious obligation to discharge it, he can have a decree against such of the assets of the family as have come or may come in their hands. I make no order as to costs in this appeal.

S.V.V. ——— *Appeal partly allowed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR HORACE OWEN COMPTON BEASLEY, *Kt., Chief Justice,* MR. JUSTICE PANDRANG ROW AND MR. JUSTICE KING.

Muthu Moopan and another .. *Petitioners** (*Accused*).

F.B. — Muthu Moopan, *In re.*

Criminal Procedure Code (V of 1898), Ss. 403 (1) and 530—Accused charged with offence under S. 353, Indian Penal Code—Sub-Magistrate acquitting accused upholding plea of illegality of trial under S. 195 (1) (a), Criminal Procedure Code—Fresh complaint before another Magistrate—Plea of autrefois acquit—*Refusal to entertain the plea—Whether previous acquittal as of right would bar subsequent trial.*

Two accused were charged with an offence under S. 353, Indian Penal Code, by the Revenue Inspector and a charge-sheet was filed by the police before the Sub-Magistrate, who after hearing the prosecution evidence, came to the conclusion that a *prima facie* case was made out not under S. 353 but only under S. 186 of the Penal Code. He thereupon framed a charge under that section and took the evidence for the defence. The Sub-Magistrate upheld the plea that the trial was illegal under S. 195 (1) (*a*), Criminal Procedure Code, and acquitted the accused. The Revenue Inspector thereupon filed his complaint in person before the Court and the case was transferred to the file of another Sub-Magistrate. The accused raised the plea that having already been acquitted of the offence they could not under the proviso of S. 403 (1), Criminal Procedure Code, be tried for it again. On a revision being filed against the order of refusal to entertain the objection, the matter was referred to a Full Bench for deciding the conflict of decisions in *Ganapathi Bhatta,* In re, (1911) 24 M.L.J. 463: I.L.R. 36 Mad. 308; *Emperor* v. *Ambaji Dhakya Katkari,* (1928) I.L.R. 52 Bom. 257 and *Mohendra Nath Sahu* v. *Emperor,* A.I.R. 1934 Pat. 411.

Held, the answer to the question would be apparent at once on a perusal of S. 530 of the Code. According to that section if any Magistrate 'not

---

* Cr. R. C. No. 327 of 1936. 2nd December, 1936.
Cr. R. P. No. 302 of 1936.

F.B.

Muthu Moopan, *In re.*

being empowered by law in this behalf' tried an offender, his proceedings should be void. The Sub-Magistrate who originally tried the accused though empowered to try an offence under S. 186, Indian Penal Code, was not empowered to try them for this particular offence, as S. 195 prevented him from taking any notice whatever of the offence until a proper complaint was filed. His trial was therefore void. His charge was void. His judgment of acquittal was void. There was nothing which the accused could compel the Court to recognise in support of a plea under S. 403. Hence the subsequent order of the other Magistrate refusing to drop the proceedings against the accused was right.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Sub-Magistrate of Perundurai, dated 2nd April, 1936 and made in C. C. No. 46 of 1936.

K. Desikachari and *R. Desikan* for Petitioners.

The Public Prosecutor, A. Narasimha Aiyar and *Parakat Govinda Menon* on behalf of the Crown.

The Court made the following

Burn, J.

ORDER. *Burn, J.*—This case should, I think, be posted before a Bench. The previous acquittal by the Sub-Magistrate, Erode, was not upon the merits, though a charge was framed and defence evidence recorded. It was based on the ground that there was no complaint by the public servant or by any one to whom the public servant was subordinate. In that case it seems clear that the Sub-Magistrate, Erode, had no jurisdiction to do *anything*; all his proceedings were null and void *ab initio* and could not be held to be a 'trial' barring a second trial under S. 403, Criminal Procedure Code. (Vide *Ravanappa Reddi,* In re[1].) The Sub-Magistrate, Erode, on this reasoning, was merely wasting paper when he wrote out his order of acquittal; he could no more acquit than he could convict.

This point was not considered in *Ganapathi Bhatta,* In re[2]. That decision itself has been dissented from by the High Courts, Allahabad (*Emperor* v. *Husain Khan*[3]) and Patna (*Sheikh Mohammad Yasin* v. *King-Emperor*[4]) and needs re-consideration in view of *Ravanappa Reddi,* In re[1].

Hence I think this case should be decided by a Bench.

---

1. (1931) 62 M.L.J. 735: I.L.R. 55 Mad. 343 at 345.
2. (1911) 24 M.L.J. 463: I.L.R. 36 Mad. 308.
3. (1916) I.L.R. 39 All. 293.
4. (1926) I.L.R. 5 Pat. 452.

F.B.

Muthu Moopan, *In re.*

Mockett and Lakshmana Rao, JJ.

(22nd October, 1936.) The case came on for hearing before Mockett and Lakshmana Rao, JJ., who made the following

ORDER OF REFERENCE TO A FULL BENCH.

The petitioners were charged by the police with an offence under S. 353, Indian Penal Code, on the report of the Revenue Inspector of Modakurichi and they were acquitted after trial on the ground that the offence disclosed by the evidence was one under S. 186, Indian Penal Code, which under S. 195, Criminal Procedure Code, cannot be taken cognisance of by any Court except on the complaint in writing of the Revenue Inspector or some other public servant to whom he is subordinate. The complaint out of which this revision petition arises was then filed by the Revenue Inspector and the question for decision is whether the previous acquittal operates as a bar to the present trial. This depends upon the competency of the Court which acquitted the petitioners to try the offence under S. 186, Indian Penal Code, and as pointed out by our learned brother, Burn, J., in the order of reference, there is a conflict of authority on the point. The decision in *Ganapathi Bhatta, In re*[1], which is in favour of the petitioners has been expressly dissented from in *Emperor* v. *Ambaji Dhakya Katkari*[2], *Sheikh Mohammad Yasin* v. *King-Emperor*[3] and *Mohendra Nath Sahu* v. *Emperor*[4] and the Calcutta and Allahabad Courts also have taken a contrary view. In the circumstances we consider it desirable to have an authoritative pronouncement on the point. We would therefore refer the case to a Full Bench.

The case coming on for hearing before the Full Bench as constituted above, the Court delivered the following

King, J.

JUDGMENTS. *King, J.*—On 10th September, 1935, the Revenue Inspector of Modakurichi firka, Coimbatore District, made a complaint to the Police under S. 353, Indian Penal Code, against two accused, Mari Moopan and Mootha Moopan. A charge-sheet was filed by the Police before the Sub-Magistrate of Erode, who, after hearing the prosecution evidence, came to the conclusion that a *prima facie* case was made out not under S. 353 but only under S. 186. He thereupon framed a charge under that section and took the evidence for the defence. When the case came to be argued the plea was raised for the accused that the trial was

1. (1911) 24 M.L.J. 463: I.L.R. 36 Mad. 308.
2. (1928) I.L.R. 52 Bom. 257.
3. (1926) I.L.R. 5 Pat. 452.
4. A.I.R. 1934 Pat. 411.

F.B.

Muthu Moopan, *In re.*

King, J.

illegal as S. 195 (1) (*a*), Criminal Procedure Code, enacts that no Court shall take cognisance of an offence under S. 186, Indian Penal Code, except upon the complaint of the public servant concerned or some other public servant to whom he is subordinate. The Sub-Magistrate upheld this plea and acquitted the accused. The Revenue Inspector thereupon filed his complaint in person before the Court and the case was transferred to the file of the Sub-Magistrate of Perundurai. The accused petitioned the District Magistrate to withdraw the prosecution, urging that having already been acquitted of the offence they could not, under the provisions of S. 403 (1), Criminal Procedure Code, be tried for it again. The District Magistrate refused to withdraw it. Then they raised their plea of *autrefois acquit* before the Sub-Magistrate. He, naturally, with the District Magistrate's order before him, refused to entertain it. The accused have accordingly filed this Revision Petition in the High Court, and, as there is a conflict of authority on the point in issue, the petition has been referred to a Full Bench.

The material portion of S. 403 (1) runs as follows:—

> " A person who has once been tried by a Court of competent jurisdiction for an offence and....acquitted of that offence shall, while such....acquittal remains in force, not be liable to be tried again for the same offence".

The conflict of authority is concerned with the expression 'Court of competent jurisdiction'. In Madras it has been held (Vide *Ganapathi Bhatta,* In re[1],) with reference to the similar expression 'competent to try' in sub-S. (4) of S. 403, that it refers only to the character and status of the tribunal, which means that a Second Class Magistrate like the Sub-Magistrate of Erode, is always 'competent' to try a 'second class case', such as an offence under S. 186, Indian Penal Code. Four other High Courts on the other hand, Bombay, Calcutta, Allahabad and Patna take the wider view that a Court which tries an offender on a complaint which it is forbidden by the Code to entertain unless certain conditions are satisfied acts without jurisdiction.

I do not think it necessary to examine these cases, or to come to any final conclusion on the meaning of the word 'competent' in S. 403. I prefer to approach the problem from a slightly different direction. The accused in this case are

---

1. (1911) 24 M.L.J. 463: I.L.R. 36 Mad. 308.

F.B.

Muthu Moopan, *In re.*

King, J.

being prosecuted for an offence. They say they have already been acquitted of that offence. Is that acquittal valid; does it 'remain in force'; has it ever had any force; can a Court take any notice of it?

The answer to these questions is in my opinion clear and apparent at once on a perusal of S. 530 of the Code. According to that section if any Magistrate 'not being empowered by law in this behalf' tries an offender his proceedings shall be void. The Sub-Magistrate of Erode was certainly empowered by S. 28 to try *an offence* under S. 186, Indian Penal Code, but was he empowered to try *these offenders* for this particular offence? Clearly not, for S. 195 prevents him from taking any notice whatever of the offence until a proper complaint is filed. His trial was therefore void. His charge was void. His judgment of acquittal was void. There is nothing which the accused can compel the Court to recognise in support of a plea under S. 403.

I accordingly hold that the order of the Sub-Magistrate of Perundurai refusing to drop the proceedings against the accused is right, and would dismiss this petition.

Beasley, C.J.

The Chief Justice:—I agree.

Pandrang Row, J.

Pandrang Row, J.—I agree and wish only to add that the conclusion we have come to is in consonance with the rule of English law on the subject laid down in *Rex* v. *Marsham*[1] by Avory, J., as follows:

"It is clear that in order to plead such a plea effectually—either a plea of *autrefois acquit* or *autrefois convict*—it must appear that the defendant has been legally convicted or legally acquitted, and it is laid down in Chitty on Criminal Law, second edition, Vol. I, p. 455, that 'the point in discussion always is whether, in fact, the defendant could have taken a fatal exception to the former indictment; for if he could, no acquittal will avail him'."

K.C. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW.

D. N. Venkatanarayana Aiyar .. *Petitioner* (Accused).*

Venkatanarayana Aiyar, *In re.*

*Madras Prevention of Food Adulteration Act (III of 1918)—Charge under S. 5 (1) against employer—Trial of—Defence that servant sold contrary to master's orders—Case for prosecution closed—Application under S. 6 (2) to summon the servant and examine him—If can be rejected as late—*De novo *trial—Failure to renew the application under S. 6 (2)—If accused precluded from questioning the legality of trial.*

1. (1912) 2 K.B. 362 at 365.

* Cr. R. C. No. 582 of 1936. 15th January, 1937.
Cr. R. P. No. 534 of 1936.

Venkata-narayana Aiyar, *In re.*

It is a special privilege given to the accused under S. 6 (2) of the Madras Prevention of Food Adulteration Act, 1918, to apply for the examination of any person whom he charges as the actual offender and as the Act fixes no limit of time within which the privilege is to be claimed, the accused is entitled to claim the privilege at any stage of the trial before the pronouncement of the judgment.

After the prosecution closed its case and when the accused himself was being examined as to his defence, the accused applied under S. 6 (2) to examine his servant whom he charged as the actual offender, but that application was rejected by the Magistrate as filed late. Afterwards there was a *de novo* trial before another Magistrate when he did not renew his application.

Held, that it was not necessary to renew the application again and the original rejection of application was illegal.

Nature of a *de novo* trial pointed out.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Sub-Divisional Magistrate of Trichinopoly in C. A. No. 1 of 1936 preferred against the judgment of the Court of the Town Sub-Magistrate of Trichinopoly in C. C. No. 810 of 1935.

G. Gopalaswami for Petitioner.

The Public Prosecutor on behalf of the Crown.

The Court made the following

ORDER.—The petitioner in this case is a coffee hotel-keeper at Trichinopoly, who has been convicted of an offence punishable under S. 5 (1) of the Madras Prevention of Food Adulteration Act, 1918. The offence is said to have been committed in respect of the sale of milk on the 27th of June, 1935, by a servant boy employed in the coffee hotel and not by the petitioner himself, though, according to the prosecution, the petitioner was present when the milk was served to the Sanitary Inspector. One of the main defences in both the Courts below was that the servant boy sold the milk contrary to his master's orders and without his consent. In support of this defence he made an application under S. 6, sub-S. 2 of the Act which provides that:

" Where an employer is charged with an offence under the Act he shall be entitled on application duly made by him to have any other person whom he charges as the actual offender brought before the Court at the time appointed for hearing, etc."

This application was rejected by the trying Magistrate apparently on the ground that it was made only after the prosecution had closed its case and when the accused was himself

Venkatanarayana Aiyar, *In re.*

being examined as to his defence. The reason given for this rejection of the application is obviously not a good one, for S. 6 (2) which gives the employer (accused) this peculiar privilege does not specify that the privilege must be claimed at any particular point of the trial or that it should be claimed before the prosecution closes its case. It is a special privilege given by law and as there is no limit of time fixed for claiming the privilege except the natural limit of pronouncement of judgment in the case it must be held that the employer accused can claim the privilege at any stage of the trial. This point was raised in both the Courts below but the appellate Magistrate was of opinion that the accused had nobody to blame but himself because he did not renew his application under S. 6 (2) of the Act before the Magistrate who actually heard the case *de novo* at his instance. What is called a trial *de novo* is not strictly speaking a new or fresh trial. All that it means is that the accused has the right to have all or any of the witnesses re-summoned and re-heard by the new Magistrate. It does not mean that when the accused claims this privilege of re-summoning and re-hearing the witnesses what had taken place before is completely wiped out or that he should renew every application which he had made before he claimed that privilege. In any case, it appears to me that the trying Magistrate was not right in denying the privilege which was given by law to the petitioner and the trial has therefore been not according to law. The conviction and sentence must therefore be set aside on this ground alone, namely, that the trial has not been according to law and especially that provision of law which is embodied in S. 6 (2) of the Act in question. In view of the nature of the case and the fact that the accused petitioner must have already suffered sufficiently in pocket by reason of the appeal and the revision petition, I do not think it is necessary in the interests of justice that there should be a retrial.

S. V. V. ——— *Petition allowed.*
Conviction set aside.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR HORACE OWEN COMPTON BEASLEY, *Kt.*, *Chief Justice.*

Perumal Mudaliar .. *Petitioner** (*Plaintiff*).

v.

The South Indian Railway Company, Limited, by its Agent at Trichinopoly .. *Respondent* (*Defendant*).

Perumal Mudaliar *v.* S.I.Ry. Co., Ltd.

Contract—Railway Company—Consignment of oil-cakes—Declaration that they were to be used as manure—Concession rate charged thereon—The company discovering later that the declaration is wrong—If can reclassify the consignment and collect excess—South Indian Railway Company Goods Tariff, Part I, rr. 15 and 20—Onus on consignee to prove that description is correct.

Where 200 bags of cocoanut oil-cakes were consigned at Rajahmundry to Podanur and the consignment was originally charged by the Railway Company at a concession rate accepting the declaration of the consignor that they were "intended for manurial purposes" it is nevertheless open to the Railway Company under rr. 15 and 20 of the South Indian Railway Company, Limited, Goods Tariff, Part I, to reclassify the goods and charge and collect the higher rate from the consignee at the destination if the description in the declaration is wrong and the oil-cakes were not going to be used for manure as set out in the declaration but as cattle-fodder. It is for the consignee to show that the declaration was correct and that the particular consignment was intended to be used for manure and was in fact used as such.

Petition under S. 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the District Munsif of Coimbatore dated 8th December, 1934 in S. C. S. No. 625 of 1934.

R. Rangachari and *V. Seshadri* for Petitioner.

S. S. Ramachandra Aiyar for Respondent.

The Court delivered the following

JUDGMENT.—This is really a comparatively simple case although a great deal has been made of it here, and certainly one part of the case, although it does not affect the matter, give rise to a considerable amount of discussion. With that I will deal later.

The suit was filed by the petitioner against the South Indian Railway Company claiming a refund of an excess charge levied by the company at Podanur on a consignment of 200 bags of cocoanut oil-cakes and also a charge made for demurrage as well. There was also a claim for interest. The bags were consigned at Rajahmundry on 20th September, 1932, the destination of the consignment being Podanur. The bags arrived at Podanur and on 27th September, 1932, a sum of Rs. 159-14-0 was tendered as freight for the bags by the

* C. R. P. No. 603 of 1935. 17th November, 1936.

Perumal Mudaliar *v.* S.I.Ry. Co., Ltd.

petitioner to the Railway Company. The company refused to deliver the consignment to the petitioner, unless an excess charge of Rs. 90-8-0 was paid and also a smaller sum of Rs. 7-15-0 for demurrage. On 29th September, 1932, the amount of excess charge and demurrage was paid by the petitioner under protest and delivery of the bags taken. The goods when they were put on the railway for carriage at Rajahmundry were certified by the consignor in the risk-note as being "intended for manurial purposes and for inland use only, not intended for shipment." A declaration (Ex. III) was also given by the consignor to the following effect:

> "This is to certify that the consignment of 200 bags oil-cake booked under invoice No. 3 of 20th September, 1932, Rajamundry to Podanur and loaded in E. I. R. C. G. No. 27300 is for manurial purposes and for inland only and not intended shipment."

As before stated, the consignment arrived at Podanur and the Railway Company, having reason to suppose that these oil-cakes were not going to be used for the purpose set out in the certificate but as cattle-fodder, under Rr. 15 and 20 of the South Indian Railway Company, Ltd., Goods Tariff, Part I, reclassified the consignment and called upon the consignee to pay the excess charge which the Railway Company are entitled under r. 20 to levy. The question in the lower Court was whether in fact there had been an incorrect description of the consignment given by the consignor at Rajahmundry. The question of description is one of considerable importance because if the oil-cakes were intended for the purposes of manure as was stated, the consignment would have applied to it a lower rate, namely, the C-FF rates, whereas, if the oil-cakes were for other purposes, a higher rate, namely, that ultimately levied by the Railway Company, would have to be applied. The learned District Munsif after hearing the evidence of the petitioner's witnesses which he describes as not being very convincing, held that the petitioner had not established his case, namely, that these goods were correctly described in the certificate and the declaration to which I have already referred. He accordingly dismissed the suit. Then a further point was taken, namely, that the Railway Company was not entitled after the acceptance of the declaration at the forwarding station to reclassify the goods consigned. Upon this point he was in favour of the Railway Company and obviously quite rightly, having regard to rr. 15 and 20 to which I have already referred and I imagine every common sense

Perumal Mudaliar v. S.I.Ry. Co., Ltd.

principle. Here it has been contended that there was no evidence before the District Munsif upon which he could hold that there had been a misdescription of these goods at Rajahmundry; in other words, the learned District Munsif was bound to accept the plaintiff's oral evidence and that of his own witnesses upon this point, there being no evidence at all to the contrary called on behalf of the Railway Company. It is here that the matter to which I first referred at the beginning of my judgment arises. At the trial the following documents were put in and marked as Exhibits on behalf of the Railway Company, namely, a report made by a Claims Inspector of the South Indian Railway to the company touching this matter setting out the result of his enquiries and the opinions of others and his own with regard to the use of cocoanut oil-cakes in Coimbatore and elsewhere. This report was marked as Ex. VI. Two letters were put in, Exs. VII and VII-A, the former being from the Chief Commercial Superintendent of the Railway Company to the Director of Agriculture, Madras and the latter being the reply from the Director of Agriculture giving his opinion upon the question put to him touching the matter of these oil-cakes. I am amazed to see that those documents were allowed to be exhibited without the writers of them being called to give evidence if they were tendered, as apparently it is contended they were, as forming the opinion of experts. But Ex. VI, the report of the Claims Inspector, cannot be regarded as expert evidence on the question as to the use of oil-cakes since the report is based purely upon hearsay evidence, though the opinion of the Director of Agriculture is certainly the opinion of an expert, but this evidence being only documentary, is clearly inadmissible. The evidence of experts must be given in the ordinary way. Subject to certain exceptions—those exceptions being amongst others the certificates of the Imperial Serologist touching the matter of blood-stains and of the Chemical Examiner, which are made admissible in evidence by themselves—it is quite obvious that the opinion of an expert must be given orally and that a report merely or certificate by him cannot possibly be evidence. Unless he goes into the witness-box and gives oral evidence, there can be no cross-examination of the expert at all. Most amazingly these documents were allowed to be marked as Exhibits without any sort of objection by the pleader for the petitioner, and had he raised the objection which it was his duty

Perumal Mudaliar v. S.I.Ry. Co., Ltd.

and right to do, then the Railway Company would have been given time, I have no doubt, to call the experts in question. No such objection was ever taken; and, quite apart from that, even without an objection, it seems to me that the learned District Munsif was quite wrong in allowing those documents to be marked at all as Exhibits in the case. This matter—no objection having been taken to the evidence—I thought at one time would justify me in remanding the case for a further finding of fact after the respondent company had been given an opportunity of putting forward the evidence in the regular way by means of witnesses. But having gone through the evidence adduced on behalf of the petitioner, I entirely agree with the learned District Munsif that the petitioner did not show that the certificate Ex. III given was a correct one and that the description that the goods were intended for use as manure was a correct description. He could have shown this by producing evidence to show that the oil-cakes had in fact been put to that use but, although the evidence was given two years after the consignment was taken delivery of at Podanur, no such evidence was forthcoming. The plaintiff was bound to prove that this particular consignment was used for the purpose of manure. It would not have availed him—and in fact his evidence did not go to anything like that length—to show that some other consignment of cocoanut oil-cakes had been used for that purpose. As I read the evidence, account books were kept but no account books were produced in order to show that this consignment was used for the purpose of manure or was sold to somebody for use for that purpose. No evidence whatever worthy of the name has been called to show how that consignment was dealt with by the petitioner after he had taken delivery of it. On the facts, therefore, the petitioner failed to prove his case. On the question of law, I am clearly of the opinion that the learned District Munsif was right in holding that the Railway Company was entitled to reclassify the goods in the manner it did. I had presented to me an argument which completely ignored rr. 15 and 20 of the South Indian Railway Company, Limited, Goods Tariff, Part I and proceeded to the length of stating that when once a Railway Company has accepted goods and the certificate and the declaration made as to the nature, quality and description of the goods, then thereafter even if the Railway Company discovers that the certificate is false and the description is wrong and that the goods

Perumal Mudaliar v. S.I.Ry. Co., Ltd.

ought to have had applied to them a higher rate, it is not entitled to charge the higher rate. Quite apart from the fact that this amazing proposition is not supported by any authority in point, were that to be the law, then fraud would be made easy. For example, a person could consign goods enclosed in a securely packed chest and give to them a certain description and without opening the case the Railway Company would be unable to say at the time the consignment is made whether the goods answer to the description or not. If the Railway Company accept the goods as being of that description, it does so on the assumption that the description is correct. If it finds that the description is otherwise, it is entitled to its remedy. Apart from this obvious right there are rr. 15 and 20. R. 15 lays down that the Railway reserves the right of re-measurement, re-weighment, re-classification and re-calculation of rates, terminals and other charges and correction of any other errors at the place of destination and of collecting any amount that may have been omitted or under-charged and that no admission is conveyed by a Railway receipt that the weight as shown therein has been received or that the description of goods as furnished by the consignor is correct. How the argument addressed to me could possibly be presented with any hope of success in view of the latter words of this rule I cannot understand. R. 20 provides that if on arrival at destination it is found that the goods have been improperly described and that a lower rate than that correctly applicable has been thereby obtained, charges at double the highest rate in force, *viz.*, 9th clause, will be levied calculated on the entire distance over which the consignment has been carried. I may here mention that no double rate was in fact levied by the company but all that the company did was to levy the rate which is properly applicable to that particular consignment, it being a consignment which could not be carried under the C-FF rates. This disposes of the case entirely. Both on the facts and upon the law the petitioner's suit rightly failed and this Civil Revision Petition must be dismissed with costs.

S. V. V. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATARAMANA RAO.

K. M. Venkatachala Chetty .. *Appellant**

v.

V. D. Natesa Chetty .. *Respondent.*

Venkatachala Chetty *v.* Natesa Chetty.

Court-fees—Madras High Court Original Side Rules, rr. 35 and 36—"Final judgment"—What constitutes—Suit for dissolution of partnership and accounts—Partnership found and case referred to Official Referee for taking of accounts—Appeal against judgment under cl. 15 of the Letters Patent—Court-fee payable.

Where in a suit for dissolution of partnership and accounts filed on the Original Side of the High Court of Madras the Court held that a partnership subsisted between the plaintiff and the defendant and referred the case to the Official Referee for the taking of the necessary accounts and the defendant preferred an appeal against the judgment under cl. 15 of the Letters Patent.

Held, that the judgment under appeal was a 'final judgment' and court-fee was payable on the memorandum of appeal under r. 35 and not under r. 36 of the Madras High Court Original Side Fees Rules.

Meaning of the expression 'final judgment' discussed.

Tuljaram Row v. *Alagappa Chettiar,* (1910) 21 M.L.J. 1: I.L.R. 35 Mad. 1 (F.B.); Ex parte *Chinery,* (1884) 12 Q.B.D. 342; In re *Riddell*: Ex parte *Earl of Strathmore,* (1888) 20 Q.B.D. 512 and *Tata Iron and Steel Co., Ltd.* v. *Chief Revenue Authority of Bombay,* (1923) 45 M.L.J. 295: L.R. 50 I.A. 212: I.L.R. 47 Bom. 724 (P.C.), relied on.

Appeal sought to be preferred against the judgment and decree of the Hon'ble Mr. Justice Wadsworth dated 27th March, 1936 and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C.S. No. 538 of 1932.

G. Ramakrishna Aiyar for Appellant.

Respondent not represented.

The Court made the following

ORDER.—The question involved in this reference relates to the amount of court-fee payable upon a memorandum of appeal presented against a judgment delivered on the original side of the High Court declaring that a partnership subsisted between the plaintiff and the defendant in an action for dissolution of partnership and referring it to the Official Referee for the taking of the necessary accounts. The provisions which regulate the payment of the court-fee are rr. 35 and 36 of the High Court Fee Rules, 1933. They run thus:

"35. Memorandum of appeal from a final judgment when the value of the subject-matter of the appeal does not exceed Rs. 2,500. .... Rs. 225."

"36. Memorandum of appeal from any other judgment or order.. Rs. 100."

---

* S.R. No. 14872 of 1936. 17th November, 1936.

Venkatachala Chetty v. Natesa Chetty.

The fee of Rs. 100 was paid by the appellant under r. 36 and he contends that it is sufficient. The argument of his learned counsel is, as the matter has been referred to the official referee for accounts, the suit cannot be said to be finally disposed of, and there was no final judgment within the meaning of r. 35, and he was not bound to pay a higher court-fee than what he has done. An appeal lies from the judgment of a single judge in a suit instituted on the original side under cl. 15 of the Letters Patent. The word 'final' is not to be found in cl. 15 but it occurs in cl. 39 of the Letters Patent where an appeal is provided to His Majesty in Council against the final judgment, decree or order of the High Court of Judicature at Madras. It may be noticed that cl. 40 of the Letters Patent provides a similar appeal against any preliminary or interlocutory judgment, decree or order of the High Court under certain conditions specified in the said clause. So far as our High Court is concerned, there has been a judicial interpretation of what a 'judgment' is within the meaning of cl. 15 of the Letters Patent in the Full Bench decision in *Tuljaram Row* v. *Alagappa Chettiar*[1] and ever since the date of the said decision, so far as I know, it has been treated as an authority on the said matter and subsequent decisions have in this Court uniformly adopted the interpretation given therein. According to the said decision the word 'judgment' in cl. 15 would cover not only a final judgment but an interlocutory or preliminary judgment. But neither Arnold White, C.J., nor Krishnaswamy Aiyar, J., defined what a final judgment is. Krishnaswamy Aiyar, J., adopts the definition given by Black in his Book on Judgments, for explaining what an interlocutory judgment is. He seems to treat the terms 'interlocutory' and 'preliminary' as synonymous. It is unnecessary for me to consider whether this view is sound. I think it is enough to determine for the purpose of this reference what a final judgment means. If it is determined what 'a final judgment' means, every judgment which is not final will be either interlocutory or preliminary.

The cases in English Law on the question what is a 'final judgment' are not easy to reconcile, but the Judicial Committee for the purpose of the Letters Patent seems to have adopted the definition of final judgment as given by Cotton, L.J., in

1. (1910) 21 M.L.J. 1: I.L.R. 35 Mad. 1 (F.B.).

Venkatachala Chetty *v.* Natesa Chetty.

Ex parte *Chinery*[1] and by Lord Esher, M.R., in *Onslow* v. *Commissioners of Inland Revenue*[2]. (Vide *Tata Iron and Steel Co., Ltd.* v. *Chief Revenue Authority of Bombay*[3].) In Ex parte *Chinery*[1] Cotton, L.J., observes:

"I think we ought to give to the words 'final judgment' in this sub-section their strict and proper meaning, that is, a judgment obtained in an action by which a previously existing liability of the defendant to the plaintiff is ascertained or established".

In *Riddell,* In re: *Earl of Strathmore,* Ex parte[4], Lord Esher, M.R., after citing with approval the opinion of Cotton, L.J., explains what a final judgment means thus:

"A final judgment means a judgment obtained in an action by which the question whether there was a pre-existing right of the plaintiff and against the defendant is finally determined, in favour of either of the plaintiff or of the defendant. I think that definition will be found to cover most cases, though perhaps not every one. . . . . In my opinion the question is, not only was the claim determined, but was it finally determined? It can only have been finally determined if between the two parties to the action it cannot be raised again. If between those two parties the question of the plaintiff's alleged right as existing before he brought the action was finally determined, whether it was tried 'on the merits' or not, the order is a final judgment". . . . .

If this test is adopted there can be no question that the judgment in a suit for dissolution of partnership or in a suit for account which determines the liability of the parties finally in the sense that so long as that judgment stands it cannot be tried again, the judgment in the present case will be a final judgment within the meaning of r. 35 of the Fee Rules.

This view is also borne out by the opinion expressed by the Judicial Committee in more cases than one on the language of S. 595, Civil Procedure Code of 1882. Under cl. (*c*) of that section which now corresponds to S. 109 (*c*) of the present Code an appeal was held to lie to His Majesty in Council from any final decree passed on an appeal by a High Court or any other court of final appellate jurisdiction. In *Rahimbhoy Habibbhoy* v. *C. A. Turner*[5], a question arose thus: the decree directed the taking of accounts which the defendant contended ought not to be taken at all. This was passed by the judge sitting on the original side of the High Court and it was confirmed in appeal by a Bench of two Judges. Against the decision in appeal, leave to appeal to His Majesty in Council

1. (1884) 12 Q.B.D. 342. 2. (1890) 25 Q.B.D. 465.
3. (1923) 45 M.L.J. 295: L.R. 50 I.A. 212: I.L.R. 47 Bom. 724 at 733 (P.C.).
4. (1888) 20 Q.B.D. 512.
5. (1890) L.R. 18 I.A. 6: I.L.R. 15 Bom. 155 (P.C.).

Venkatachala Chetty v. Natesa Chetty.

was sought. The High Court declined leave on the ground that it was not a final decree within the meaning of S. 595, cl. (*c*) of the Civil Procedure Code. The Privy Council expressed the opinion that this view was wrong. Lord Hobhouse observed thus:

"The real question in issue was the liability, and that has been determined by this decree against the defendant, in such a way that in this suit it is final. The Court can never go back again upon this decree so as to say that, though the result of the account may be against the defendant, still the defendant is not liable to pay anything. That is finally determined against him, and therefore in their Lordships' view the decree is a final one within the meaning of S. 595 of the Code."

It will be seen that this view is in accord with the view expressed by Lord Esher referred to above in In re *Riddell*: Ex parte *Earl of Strathmore*[1]. The interpretation put on the word 'final' was again re-affirmed by the Privy Council in *Saiyed Muzhar Hossein* v. *Mt. Bodha Bibi*[2]. What is meant by 'final' is further made clear by the following observations of their Lordships in the above judgment:

"The question is whether the decree of the High Court is final. It appears to their Lordships that it is final. The case is analogous to that of *Rahimbhoy Habibbhoy* v. *C. A. Turner*[3]".

There the defendant denied his liability to account to the plaintiff. The High Court affirmed his liability and directed an account. Of course the account might turn out in the defendant's favour. But their Lordships held that the order establishing liability was one which could never be questioned again in the suit, and that it was the cardinal point of the suit. As observed by the learned judges in *Chundi Dutt Jha* v. *Pudmanund Singh Bahadur*[4], the decision of the Privy Council in *Rahimbhoy Habibbhoy* v. *C. A. Turner*[3] clearly indicates in their opinion that the final decree in S. 595 does not mean the last decree but the decree determining the rights finally. Even under the new Code where the wording differs materially from that of the old Code their Lordships of the Privy Council expressed the opinion that the decision in *Rahimbhoy Habibbhoy* v. *C. A. Turner*[3], will also govern cases arising under the new Code. Referring to these two cases *Rahimbhoy Habibbhoy* v. *C. A. Turner*[3] and *Saiyed Muzhar Hossein* v.

---

1. (1888) 20 Q.B.D. 512.
2. (1895) 5 M.L.J. 20: L.R. 22 I.A. 1: I.L.R. 17 All. 112 (P.C.).
3. (1890) L.R. 18 I.A. 6: I.L.R. 15 Bom. 155 (P.C.).
4. (1895) I.L.R. 22 Cal. 928.

Venkatachala Chetty v. Natesa Chetty.

Mt. Bodha Bibi[1], the Privy Council observed thus in *Abdul Rahaman* v. *D. K. Cassim & Sons*[2]:

"Two other cases before this Board were relied on by the learned judges, viz., *Rahimbhoy Habibbhoy* v. *C. A. Turner*[3] and *Saiyed Muzhar Hossein* v. *Bodha Bibi*[1]. But both these cases were decided with reference to the Civil Procedure Code of 1882 in which the wording of the relevant sections differed materially from that of the Code of 1908. Special leave to appeal was given in each of these cases on the ground that the suit had been fully tried in the lower Court, and the 'cardinal point' decided, leaving, in the one case, only a reference for accounts and, in the other, only subordinate points for decision, should have been dealt with by the appellate Court. In the first case, *Rahimbhoy Habibbhoy* v. *C. A. Turner*[3], *it is clear that an appeal to His Majesty in Council would have laid as of right under the provisions of the present Code*".

This case clearly indicates that the principle enunciated in *Rahimbhoy Habibbhoy* v. *C. A. Turner*[3], that where the cardinal point in the case is decided and the matter is referred for the taking of accounts the judgment would be a final judgment or decree. Therefore it seems to me that a judgment which decides finally the liability to account so far as the Court deciding it is concerned, would be a final judgment within the meaning of r. 35 of the Fee Rules though there is a reference for the taking of accounts to the Official Referee. The appellant is therefore liable to pay court-fee under r. 35 of the Original Side Fee Rules.

Mr. Ramakrishna Aiyar submitted that if he were to appeal against the decree passed after the consideration of the report of the Official Referee he will have to pay another *ad valorem* fee within the meaning of r. 35 and it would work hardship. But that is a matter for amendment of the rules. In cases arising under the Court-Fees Act it may be noticed that such hardship does not occur ordinarily, because as pointed out in *Supputhayammal, In re*[4], in an appeal against a final decree in a suit credit is given to the court-fee paid on the memorandum of appeal presented against the preliminary decree. The appellant is given 10 days' time from to-day to pay the additional court-fee.

B. V. V. —— *Order made.*

---

1. (1895) 5 M.L.J. 20: L.R. 22 I.A. 1: I.L.R. 17 All. 112 (P.C.).
2. (1932) 64 M.L.J. 307: L.R. 60 I.A. 76: I.L.R. 11 Rang. 58 at 63 (P.C.).
3. (1890) L.R. 18 I.A. 6: I.L.R. 15 Bom. 155 (P.C.).
4. (1932) 62 M.L.J. 624: I.L.R. 55 Mad. 664.

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Ordinary Original Civil Jurisdiction.]

PRESENT:—SIR HORACE OWEN COMPTON BEASLEY, *Kt.*, *Chief Justice*, MR. JUSTICE MOCKETT AND MR. JUSTICE LAKSHMANA RAO.

S. A. S. S. Chellappa Chettiar, money-lender carrying on business at Kothamangalam in Ramnad District, Kyalat and Thayalinkyo in Burma and at Malacca and Kulalampur in the Federated Malay States. *Petitioner**

v.

The Commissioner of Income-tax, Madras, having his office at the Old High Court Buildings, Madras .. *Respondent.*

F.B.

Chellappa Chettiar *v.* Commissioner of Income-tax, Madras.

Indian Income-tax Act (XI of 1922), S. 10 (2) (iii)—*Person carrying on money-lending business—Debtors giving him agricultural lands in return for moneys borrowed—Whether he was entitled to a deduction of interest paid by him for business as was represented by the agricultural lands—Whether entitled to a deduction of establishment and other charges.*

In the absence of any express provision in the Act, the assessee is not to be deprived of the advantages conferred by exemptions such as S. 10 (2) (*iii*), because the capital benefiting there from by means of permissible deductions happens to produce a non-taxable income.

Hughes v. *Bank of New Zealand,* (1936) 3 All England Law Rep. 975 at 997 and 998, relied on.

Where a person who was carrying on business as a money-lender, borrowed money for his money-lending business, lent it out to constituents, and was obliged in the course of the business to receive agricultural lands in repayment of his debts from such constituents, the question arose whether he was not entitled to a deduction of the interest paid by him for business purposes as was represented by the agricultural lands got in, under S. 10 (2) (*iii*) in computing the profits and gains of the banking business for the year of account,

Held, (1) that he was entitled to a deduction of the interest paid by him on so much of the capital borrowed by him for business purposes as was represented by the agricultural lands got in, under S. 10 (2) (*iii*) in computing the profits and gains of the banking business for the year of account.

(2) That the assessee was entitled to a deduction in respect of the establishment and other charges for managing and cultivating the lands on the ground that they were expenses incurred for agricultural purposes and the amount spent for obtaining conveyances on the ground that it was an expense of a capital nature.

Case-law reviewed and discussed.

In the matter of The Indian Income-tax Act XI of 1922 and *In the matter of* the assessment of S. A. S. S. Chellappa Chettiar, Kothamangalam.

---

* O. P. No. 252 of 1935. 15th January, 1937.

F.B.

Chellappa Chettiar *v.* Commissioner of Income-tax, Madras.

Case stated by the Commissioner of Income-tax, Madras, was as follows:—

In accordance with the High Court's order quoted above I have the honour to refer the following case for the decision of the Hon'ble the Judges of the High Court under S. 66 (3) of the Indian Income-tax Act (XI of 1922), hereinafter referred to as the Act.

The petitioner is the manager of a Hindu undivided family deriving income from property, business (money-lending) at Kothamangalam (his headquarters) within the jurisdiction of the Income-tax Officer, Karaikudi, II Circle at Kyaiklat and Thayetmyo in Burma, and at Klang, Malacca and Kulalumpur in the Federated Malay States. He also derives income from agricultural lands.

For the assessment of the year 1934-35 (previous year—Tamil year Srimukha—corresponding to 13th April, 1933 to 12th April, 1934) the petitioner was assessed on a total income computed at Rs. 30,963. In computing the income as above, the Income-tax Officer disallowed (*i*) Rs. 17,796 under interest payments in the Kyaiklat branch and (*ii*) Rs. 3,114 under establishment and other charges in the Kyaiklat and Thayetmyo branches.

(i) *Interest disallowed in the Kyaiklat branch Rs. 17,796.* The petitioner owns lands used for agricultural purposes and assessed to land revenue in Burma. These lands were acquired in repayment of money lent in the course of the money-lending business carried on at Kyaiklat. He now cultivates them and derives income from them. The amount invested in these lands, the expenses incurred in cultivating them and the receipts from them are incorporated in the accounts of the money-lending business. The business is conducted mainly with borrowed capital. According to the Balance Sheet as on the last day of the year of account the total amount borrowed is Rs. 5,82,897, while the petitioner's own capital is Rs. 37,036, and the total amount invested in lands is Rs. 4,52,192. Thus roughly 4/5th of the borrowed amount has been used for purchasing the lands. The total interest on the borrowed money paid during the year of account amounted to Rs. 22,245 and the receipts from the lands amounted to Rs. 11,567. In determining the profits liable to assessment the petitioner excluded the receipts, *viz.*, Rs. 11,567 from his income on the ground that it was "agricultural income" exempt from assessment under S. 4 (3) (*viii*) of the Act, but claimed the entire interest paid, *viz.*, Rs. 22,245. A copy of the Profit and Loss account filed, by the petitioner along with his return of income is filed, marked Ex. A. The Income-tax Officer held that since 4/5th of the borrowed

F.B.

Chellappa Chettiar *v.* Commissioner of Income-tax, Madras.

money had been invested in lands the income from which (Rs. 11,567 in the year of account) was exempt from assessment, the interest paid on the borrowed money to the extent to which it had been used for purchasing lands was not deductible from the profits of the money-lending business liable to assessment. He accordingly disallowed 4/5th of Rs. 22,245 or Rs. 17,796. These figures are not disputed.

(ii) *Establishment and other charges disallowed Rs. 3,114.* This is made up of the following items:—

(*a*)	Establishment charges	.. Rs.	2,298
(*b*)	Loss in cattle purchase, lands and bulls accounts	.. "	779
(*c*)	Conveyance charges relating to lands	.. "	37
		Rs.	3,114

The staff employed by the petitioner at Kyaiklat attended both to the management of the lands and to the money-lending business. But the expenses on account of establishment charges were all debited to one account. The total expenditure under this head claimed by the petitioner was Rs. 5,490. Of this, Rs. 893 was salary payable prior to the year of account. Deducting this, the salary of the year amounted to Rs. 4,597. As in the case of the interest on borrowed capital, the Income-tax Officer held that the whole of this expenditure should not be charged against the profits of the money-lending business, as it was incurred not only for earning those profits but also for earning the profits of the income from lands exempt from assessment. In the absence of separate accounts to show the agricultural portion of the expenditure the Income-tax Officer fixed it at 50 per cent. of the total with reference to the volume of work involved in each case. He accordingly disallowed half of Rs. 4,597 or Rs. 2,298. The other items amounting to Rs. 816 were expenses solely incurred in connection with the cultivation or acquisition of the lands. The Income-tax Officer therefore disallowed them also.

An extract from the Income-tax Officer's order is filed marked Ex. B.

The petitioner appealed to the Assistant Commissioner and among other things objected to the disallowance of the above two items. The Assistant Commissioner confirmed the Income-tax Officer's findings in respect of these two items but on other grounds he reduced the assessment from Rs. 30,963 to Rs. 25,605. An extract from his order is filed marked Ex. C.

The petitioner then applied to me for a reference to the High Court on two alleged questions of law. My predecessor held that

F.B.

Chellappa Chettiar v. Commissioner of Income-tax, Madras.

the questions formulated by the petitioner did not arise and accordingly dismissed the application. But under S. 33, he allowed Rs. 37 [conveyance charges relating to lands—item (ii) (*c*) in paragraph 3 above] and reduced the assessment accordingly. A copy of his order under S. 66 (2) is filed marked Ex. D.

The petitioner then moved the High Court under S. 66 (3) and the High Court has now ordered me to refer the following two questions:—

"(1) Where a person who is carrying on business as a money-lender, borrows money for his money-lending business, lends it out to constituents, is obliged in the course of the business to receive agricultural lands in repayment of his debts from such constituents, is he not entitled to a deduction of the interest paid by him on so much of the capital borrowed by him for business purposes as is represented by the agricultural lands got in under S. 10 (2) (*iii*) in computing the profits and gains of the banking business for the year of account.

(2) Whether the petitioner is not entitled to a deduction in respect of the establishment and other charges for managing and cultivating the lands in the Kyaiklat and Thayetmyo on the ground that they are expenses incurred for agricultural purposes and the amount spent for obtaining conveyances on the ground that it is an expense of a capital nature."

Question (1).—The main point for decision is whether the amount in respect of which interest has been disallowed is "capital borrowed for the purpose of the business" within the meaning of S. 10 (2) (*iii*) of the Act. It has been held by this Court (*Somasundaram Chettiar* v. *Commissioner of Income-tax, Madras*[1]) that "business" in this section means the business whose profits are being assessed in the year under consideration and that the expression "capital borrowed for the purposes of the business" means capital borrowed and used for the purposes of the business. The Bombay High Court has also held the same view (*Provident Investment Co., Ltd.* v. *The Commissioner of Income-tax, Bombay*[2]). It is not disputed that the profit from the lands though they have been acquired with the funds borrowed by the money-lending business is not the subject-matter of the assessment and in fact such profits have been rightly excluded by the petitioner and the Income-tax Officer from the computation of the 'total income'. The borrowed capital represented by these lands cannot therefore be said to have been used for earning the profits to the money-lending business which are the subject-matter of this assessment. The fact that in the year in question the income from the lands was less than the interest on the money used for acquiring them is immaterial. If the price of produce rises or the yield from the land increases the petitioner's income from the lands will certainly

1. (1927) 54 M.L.J. 436: 2 I.T.C. 505.
2. (1931) I.L.R. 56 Bom. 92: 33 Bom. L.R. 1587: 6 I.T.C. 21.

F.B.

Chellappa Chettiar *v.* Commissioner of Income-tax, Madras.

be more than the amount of the interest in question and clearly such income will continue to be exempt from assessment under S. 4 (3) (*viii*). It is inequitable to allow the petitioner to deduct from his "taxable income" the charges incurred in earning "non-taxable income". The question should be answered in the negative.

Question (2).—The question whether the establishment and other charges for managing and cultivating the lands can be deducted in computing the profits of the money-lending business will depend upon whether these charges will fall under the allowances described in S. 10 (2), cls. (*i*) to (*ix*) of the Act. Obviously cls. (*i*) to (*viii-a*) of this sub-section have no application. The condition laid down for an allowance under clause (*ix*) is that the expenditure should have been incurred solely for the purposes of earning the profits and gains in respect of which tax is payable by the petitioner under the head 'business'. The expenditure in question is similar to the interest considered under question (1) above and for the reasons given under that question this expenditure cannot be said to have been incurred for the purpose of earning the profits of the money-lending business. I am therefore of the opinion that the petitioner is not entitled to a deduction in respect of these charges. The first part of the question should be answered accordingly.

The amount spent for obtaining conveyance, *viz.*, Rs. 37 was allowed in my predecessor's order under S. 33, No. 411/35 dated 23rd July, 1935. The question whether it is expenditure of a capital nature does not therefore arise on the facts of this case. A similar question has been considered by the Privy Council in *Raja Raghunandan Prasad Singh* v. *The Commissioner of Income-tax, Bihar and Orissa*[1]. According to that decision the expenditure in question is of a capital nature. The 2nd part of the question should be answered accordingly.

T. R. Venkatarama Sastri and *K. S. Sankara Aiyar* for Petitioner.

M. Patanjali Sastri for Respondent.

The Court delivered the following

JUDGMENT.—The assessee is the manager of a Hindu undivided family carrying on money-lending business in India, Burma and the Federated Malay States with borrowed capital. The findings of fact are not very clear but before us the

1. (1933) 64 M.L.J. 544: L.R. 60 I.A. 133: I.L.R. 12 Pat. 305: 6 I.T.C. 392 at 400 (P.C.).

F.B.

Chellappa Chettiar *v.* Commissioner of Income-tax, Madras.

argument has proceeded on the following basis: Owing to certain clients in Burma being unable to meet their obligations, the assessee was compelled to receive in repayment of loans made by him, agricultural lands in Burma. The money which had been lent had originally been borrowed by the assessee for the purpose of his money-lending business, that is to say, that he borrowed and in his turn lent the same money no doubt at a higher rate of interest. It was conceded by Mr. Patanjali Sastri that the assessee was carrying on one business for the year of assessment 1934-1935. It has not been contended before us that the assessee was retaining and cultivating these lands of his own inclination, but owing to the fall in agricultural lands he was involuntarily in possession and was preserving his capital in the only way open to him pending a return of agricultural economic conditions which made it possible for him to realise if not all, at least some of the capital originally lent to the borrowers, the previous owners of the lands. It was not disputed that the whole of the money borrowed, a great part of which is now in the form of land, was originally borrowed for the purpose of the money-lending business. In view of these admissions of fact, it is not necessary for us to send this matter back to the Commissioner for findings. For the assessment of the year 1934-1935 the assessee was assessed on a total income computed at Rs. 30,963. In computing the income the Income-tax Officer disallowed Rs. 17,796 under interest payments in the Kyaiklat branch and Rs. 3,114 under establishment and other charges in the Kyaiklat and Thayetmyo branches. The interest charges disallowed were claimed by the assessee under S. 10 (2) (*iii*) of the Income-tax Act as representing the capital borrowed by him for the purpose of his business which capital was now represented by agricultural lands. The Income-tax Officer held that four-fifths of the money borrowed was so represented but he disallowed the claim on the ground that as the money was invested in agricultural lands the income from which is exempt from income-tax under S. 4 (3) (*viii*) of the Act the assessee was not entitled to the allowance mentioned in S. 10 (2) (*iii*). He accordingly disallowed the claim for interest as regards four-fifths of the money borrowed which he considered was the amount of the capital then represented by lands but he allowed the remaining one-fifth as being money borrowed for the purpose of the money-lending business and utilised therein.

F.B.

Chellappa Chettiar *v.* Commissioner of Income-tax, Madras.

The assessee also claimed a sum of Rs. 3,114 made up as follows:—

Establishment charges	..	Rs. 2,298
Loss in cattle purchase lands and bull accounts	..	„ 779
Conveyance charges relating to lands	..	„ 37

The last item was allowed by the Commissioner. The other items were claimed as being charges under S. 10 (2) (*ix*). The Commissioner disallowed the amount of these other items also on the ground that as it is expenditure for the purpose of earning agricultural income, it also was not deductable on the same grounds on which he had ruled that money borrowed and subsequently used in agricultural lands was not a permissible deduction. The assessee moved this Court and in compliance with the Court's direction the Commissioner has referred to us the following two questions:—

"(1) Where a person who is carrying on business as a money-lender, borrows money for his money-lending business, lends it out to constituents, is obliged in the course of the business to receive agricultural lands in repayment of his debts from such constituents, is he not entitled to a deduction of the interest paid by him on so much of the capital borrowed by him for business purposes as is represented by the agricultural lands got in under S. 10 (2) (*iii*) in computing the profits and gains of the banking business for the year of account?

"(2) Whether the petitioner is not entitled to a deduction in respect of the establishment and other charges for managing and cultivating the lands in Kyaiklat and Thayetmyo on the ground that they are expenses incurred for agricultural purposes and the amount spent for obtaining conveyances on the ground that it is an expense of a capital nature?"

Section 10 (1) and (2) is as follows:—

"(1) The tax shall be payable by an assessee under the head "Business" in respect of the profits or gains of any business carried on by him.

(2) Such profits or gains shall be computed after making the following allowances, namely:—

(*iii*) in respect of capital borrowed for the purposes of the business, where the payment of interest thereon is not in any way dependant on the earning of profits the amount of the interest paid."

It is, as we have emphasised, conceded that this capital was borrowed for the purpose of the business and on the facts we hold that it has also been used for the purpose of the business because it is an unquestioned fact that the assessee received these lands in repayment of the loans made by him not of his own volition but of necessity there being no other method of getting payment, and that therefore these lands came into his possession directly in the course of his money-lending business and represented the capital originally borrowed. *Prima facie*

F.B.

Chellappa Chettiar v. Commissioner of Income-tax, Madras.

therefore the assessee is entitled to the benefit of S. 10 of the Act, but the Commissioner's learned counsel argues that nothing which cannot help to earn taxable income is the subject of exemption and agricultural income is not taxable and by implication in S. 10 (1) and (2) before the words "profits and gains" must be read the word "taxable". He contends that the object of S. 10 is to reduce the amount of taxable income and that it cannot therefore possibly apply to any income which is not the subject of taxation. No case exactly in point has been cited. But the Commissioner has relied especially on two Indian decisions, one of this High Court and the other of the Bombay High Court. In *Somasundaram Chettiar* v. *Commissioner of Income-tax*[1] the question arose whether interest on capital borrowed in India to be used abroad (in that case the Federated Malay States) was a permissible deduction under S. 10 (2) (*iii*) of the Income-tax Act. It must be emphasised that no complication with regard to the use of the capital in a foreign country arises here Burma and Madras being subject to the same Act. This High Court took the view that "business" in S. 10 (2) (*iii*) means the business whose profits are being assessed in the year under consideration. In *Provident Investment Co., Ltd.* v. *The Commissioner of Income-tax, Bombay*[2], the Bombay High Court held that where an Indian finance company borrowed money in British India and invested it abroad keeping both the income and capital abroad, the interest on the money so borrowed was not deducted under S. 10 (2) (*iii*) of the Income-tax Act by reason of the fact that the income was not the subject of taxation in British India. The decision of the Court there again rested on the fact that the whole of the interest derived from the borrowed capital was outside the jurisdiction and was not the subject of taxation in India. At page 25 Beaumont, C.J., expressed himself as follows:—

"Now looking at the section again in the light of the context, tax is to be payable by an assessee under the head of "Business" in respect of the profits or gains of any business carried on by him. Clearly that must mean in respect of the taxable profits or gains of any business carried on by him and the business must be one which earns taxable profits or gains. Then we come to sub-S. (2) (iii) an allowance is to be made in respect of interest on capital borrowed for the purposes of the business. Now, I think that again must be for the purposes of the business which earns or is capable of earning taxable profits. Whether in fact taxable profits are earned or not is not

1. (1927) 54 M.L.J. 436: 2 I.T.C. 505.
2. (1931) I.L.R. 56 Bom. 92: 33 Bom. L.R. 1587: 6 I.T.C. 21.

F.B.

Chellappa Chettiar *v.* Commissioner of Income-tax, Madras.

necessarily the criterion, because the borrowed money may earn no profit, but I think the "business" referred to in that section is a business which is so carried on that taxable profits may be earned, and unless it is a business of that character a deduction for interest on capital money borrowed for the purposes of that business is not allowable under the Act".

It will be noticed in both these cases the income-tax derived from borrowed capital was not the subject of any taxation in British India. In this connection it should be observed that S. 4 of the Income-tax Act makes the Act applicable to all income, profits, or gains, accruing or arising or received in British India, or deemed to be received therein. But the Act does not apply to agricultural income in British India. Under S. 4 (3) (*viii*) it is provided that "this Act shall not apply to . . . . . agricultural income". "Agricultural income" is defined in S. 2 (1) as meaning:

"(*a*) any rent or revenue derived from land which is used for agricultural purposes, and is either assessed to land revenue in British India or subject to a local rate assessed and collected by officers of Government as such;

(*b*) any income derived from such land by (1) agriculture."

The rest of the definition is not relevant. It should be observed that the agricultural income must be derived from "such land", *i.e.*, land assessed to land revenue in British India or subject to a local rate assessed and collected by the officers of Government as such. There is no foundation therefore for the argument which we have heard that agricultural income is exempt from all taxation and it is therefore *prima facie* inequitable that money borrowed and represented by an income which does not pay tax should be subjected to any of the benefits of the Act. On the contrary, under the Act such income is expressly excluded from the burden of income-tax because it has already paid tax to Government in another form. That such circumstances as we now have to consider were in the contemplation of the legislature when passing this Act we take leave to doubt but they have arisen and must be dealt with not on general principles but in accordance with the principles relating to the construction of a fiscal statute, *viz.*, that it should be strictly construed.

It seems to us that the governing section in order to decide this matter must be S. 10 (2) (*iii*) was the capital borrowed for the purpose of the assessee's business? No difficulty arises about that for it is conceded that it was so borrowed. It was also unquestionably used for the purpose of the business

F.B.

Chellappa Chettiar v. Commissioner of Income-tax, Madras.

because it is again conceded that it was lent to the borrowers. Does it continue to be so used? It is in that respect that it is important again to emphasise that this case has been argued before us on the basis that these lands came into and were retained in the possession of the assessee in payment of a money-lending debt and *ex necessitater*. In this Presidency there is a current of authority to the effect that immovable property received by a money-lender in repayment of loans is an asset of his money-lending business and that any profits derived from the sale of such lands and also any income from the land such as rents, etc., must be regarded as the profits of such business and taxable as such (see *Chettiappa Chettiar and others* v. *The Commissioner of Income-tax, Madras*[1]). In that case as here the assessee was a money-lender who had secured his advances on rubber estates which he had finally to take over in repayment of his debts and to hold until a favourable opportunity occurred for re-sale and it was held that any profits from such re-sale were profits of his money-lending business. (See also *Lakshmanan Chettiar* v. *The Commissioner of Income-tax, Madras*[2].) In *Commissioner of Income-tax, Bihar and Orissa* v. *Maharajadhiraj of Darbhanga*[3] the Judicial Committee had before them for consideration the question as to whether income received from an estate taken over by a lender as security for an amount advanced under an usufructuary mortgage was agricultural income. At page 631, Lord Macmillan in delivering the advice of the Board after setting out the facts and emphasising that *prima facie* the income of the land was agricultural income, states as follows:—

"In answer to this *prima facie* conclusive ground for excluding the sum in question from the respondent's assessment the appellant concedes that if the respondent were not a money-lender and if the transaction in virtue of which he receives the rents had not been a transaction entered into *in the course of his money-lending business*, he would have been entitled to invoke the statutory exemption of agricultural income; but the appellant submits that the fact that the respondent carried on a money-lending business and receives the rents as the result of a transaction entered into in the course of that business makes all the difference".

It would appear therefore that the Board recognised the position that rents from agricultural lands could be received in virtue of a money-lending transaction. Their Lordships then proceed to hold that agricultural income does not lose its

1. (1929) 31 L.W. 215: A.I.R. 1930 Mad. 119: 4 I.T.C. 188.
2. (1929) 58 M.L.J. 68: 4 I.T.C. 200.
3. (1935) 69 M.L.J. 474: L.R. 62 I.A. 215: I.L.R. 14 Pat. 623 (P.C.).

F.B.

Chellappa Chettiar *v.* Commissioner of Income-tax, Madras.

character by reason of the nature of its receipt and state. "The exemption is conferred and conferred indelibly, on a particular kind of income and does not depend on the character of the recipient, ... " In view of the above we consider that all the provisions of S. 10 (2) (*iii*) are complied with in that the money concerned was borrowed and at all material times was used and continued to be used "for the purpose of the business".

Certain cases were referred to in which for the purpose of assessment the business of the assessee had been split into two categories, for instance, *Maxse's case*[1] in which the business of a journalist and the business of an editor were divided and *Ransom's case*[2] in which the business of a chemist and the business of husbandry were split. In the *Ipoh case, Somasundaram Chettiar* v. *Commissioner of Income-tax, Madras*[3], the Madras and Ipoh businesses were treated as distinct. That aspect does not arise before us because Mr. Patanjali Sastri argued the case on the basis as is unquestionably the fact that only one business was carried on by the assessee. In both the English cases cited above it must be observed that the separate enterprises were of design carried on by the assessee. For instance in *Ransom's case*[2] no doubt the firm's directors could have bought their herbs in the market but they preferred to grow them themselves. Nor was there any obligation on Mr. Maxse to be a journalist as well as an editor. But in the case before us where is the money-lender's choice? Here is the only method by which he can be repaid if further losses in the money-lending business are to be avoided. And how can agricultural land be preserved except by cultivation. The cultivation was merely a necessary incident of his involuntary possession which came to him because as a money-lender he had lent money to a borrower who could not re-pay in money. It appears therefore that only by straining the Act against the assessee can he be excluded from the benefits of S. 10 (2) (*iii*). Apart from the fact that that is not the method of construing a taxing statute it appears there is nothing unreasonable in the result at which we arrive. The legislature has thought fit to exclude agricultural income from the incidence of income-tax because it has already paid the tax in another form. The

1. (1919) 1 K.B. 647.
2. (1918) 2 K.B. 709.
3. (1927) 54 M.L.J. 436: 2 I.T.C. 505.

F.B.

Chellappa Chettiar v. Commissioner of Income-tax, Madras.

position is peculiar to India and not to England and in this case we are told—and it appears to be the fact—that the assessee would be better off if he had not taken this land from the debtor and was therefore unable to realise anything in cash as he would then be able to get the benefit of S. 10 (2) (*iii*). The argument of the Commissioner's learned counsel appears to be entirely based on the fact that agricultural income is not the subject of income-tax in British India for he conceded that had the re-payment of the loan to the money-lender been received in the form of a number of motor cars which could be let out on hire until a favourable opportunity to sell them arose (such profits would of course be taxable), the assessee would have been entitled to the benefits of S. 10 (2) (*iii*). The Commissioner has relied on *Sachindra Mohan Ghosh* v. *The Commissioner of Income-tax, Bihar and Orissa*[1]. In that case a receiver was appointed by the Court for the management of an estate which derived taxable and non-taxable income and the question arose what proportion of the salary of the receiver was allowable expenditure. That decision is of no assistance in this matter because it deals with income from "other sources", and S. 12 (2) which governs that decision permits a deduction of expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of making or earning such income, profits or gains. In the present case we are dealing with business and interest on capital borrowed for the business.

Since the arguments in this reference were concluded, a report of a very recent decision of the Court of Appeal has been received in this country and has been brought to our notice, *Hughes* v. *Bank of New Zealand*[2]. In that case the bank had a branch in London and from its floating capital had purchased 5 per cent. war loan which is tax free and 3 per cent. India Government stock and other securities on which the amount of the tax had been repaid on the ground that there was no residence by the assessee in the United Kingdom. It was sought by the income-tax authorities to tax the interest on all the above securities. The authorities further denied the right of the bank to deduct the expenses incurred by the bank for the purpose of earning the income from the above securities. The Court of Appeal after holding that the

1. (1931) I.L.R. 11 Pat. 47 : 5 I.T.C. 397. 2. (1936) 3 All. E.L.R. 975.

immunity from taxation of the above securities was absolute dealt with the question whether the expenses of the bank incurred for the purpose of earning non-taxable income were properly deducted. £41,262 was found to be the expenses attributable to the earning of the profits derived from the above-mentioned securities and it would appear that very much the same argument was advanced by the Inspector of Taxes in that case as has been advanced here. It is summarised by Lord Wright at p. 997 as follows:—

"It is contended on behalf of the Crown that, if the bank get the benefit of that exemption, it should be deprived of the advantage of deducting the sum of £41,262 being the expenses attributable to the earning of the income which has been held to be immune from taxation. In other words, it is said if the corpus—that is to say, the income—is to be excluded, the accessory—that is to say, the expense of earning it—ought also to be excluded. The exclusion on the one side ought to be balanced by the exclusion on the other, otherwise the tax-payer is getting a double advantage, he is getting his exemption in respect of the interest, and he is also having the additional benefit of deducting the expenses of earning that interest, just as if the interest had been included as taxable. I confess that there seems to be great force in that argument, and if I had been able to find a warrant for giving effect to that argument in the language of the Act I should certainly have done so, because it seems to me to be both a reasonable and a proper conclusion."

With regard to this last observation of Lord Wright, as we have already pointed out, in India a special provision is made for taxing agricultural lands so that "the double advantage" referred to is not applicable here. But at page 998 His Lordship says:

"The expenses which are dealt with here by the Commissioners are interest on the money borrowed and used to purchase these particular securities, and it would be a suitable conclusion if that could be deducted".

Lord Wright rejected the contention that one part of the expenses could be eliminated and the trade as it were divided observing that there was one individual trade. In the present reference as already indicated the agricultural activities of the assessee were inextricably mixed with and incidental to the money-lending business.

The above decision seems to support the view which we have expressed that in the absence of any express provision in the Act, the assessee is not to be deprived of the advantages conferred by exemptions such as S. 10 (2) (*iii*) because the capital benefiting therefrom by means of permissible deductions happens to produce a non-taxable income.

It follows from what has been stated above that the answer to the first question must be in the affirmative. The

F.B.

Chellappa Chettiar v. Commissioner of Income-tax, Madras.

answer to the second question will admittedly follow from the decision on the first and the answer to it therefore is also in the affirmative. The assessee will have the costs of this petition fixed at Rs. 250. The Rs. 100 deposited by the assessee will be refunded.

Questions answered in the affirmative.

K. C.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VARADACHARIAR.

Sandanam Pillai .. *Appellant** (*7th Defendant*)

v.

Somasundaram Chettiar and others .. *Respondents* (*2nd Plaintiff and Defendants 1, 3, 4 and 6*).

Sandanam Pillai v. Somasundaram Chettiar.

Hindu Law—Joint family—Nucleus—Income from, not enough for maintenance of family—Father earning—Spending portions of his earnings on maintenance of family—Acquisitions by father in his own name—If self-acquisitions—Presumptions.

Where it is found that the income from the nucleus of ancestral property is not sufficient even for the maintenance of the joint family and that the father was therefore obliged to spend in addition portions of his own earnings to meet the expenses of his family, there is no basis for the presumptions that any acquisitions made by him in his name must have been made from out of the income of the joint property or that he must, from the fact of having utilised a portion of his earnings for the maintenance of his family, be deemed to have thrown even the balance of his earnings remaining in his hands into the joint stock. The onus is upon the person who claims that the earnings have been thrown into the joint stock to prove that the earning member had relinquished his separate right over his earnings.

Second appeal against the decree of the District Court of Trichinopoly in A. S. No. 129 of 1932 preferred against the decree of the Court of the District Munsiff of Karur in O. S. No. 342 of 1928.

L. A. Gopalakrishna Aiyar for Appellant.

Sreenivasaraghavan and *Thiyagarajan* for Respondents.

The Court delivered the following

JUDGMENT.—This second appeal arises out of a suit to enforce a mortgage executed by defendants 1 and 2 in plaintiff's favour. The only question for determination in the second appeal is whether the first defendant was entitled to a share in four out of the mortgage items, namely, items 3 and 4 of Karur village and items 1 and 3 of Balambapuram village.

* S. A. No. 1291 of 1932. 4th November, 1936.

Sandanam Pillai *v.* Soma-sundaram Chettiar.

It has been found that the four items in question were acquired by the seventh defendant, the father of the mortgagors, in the years 1897, 1900, 1906 and 1908 in his own name, at a time when defendants 1 and 2 were minors. The seventh defendant contended that they were his self-acquired property and that the first defendant had no share therein which would pass under the mortgage. The first Court held that the first defendant had no interest in these items and passed a mortgage decree against the first defendant's share in the other items comprised in the mortgage; but on appeal the learned District Judge held that these items, though acquired by the father, had not been kept separate by him as self-acquired property and that the first defendant was therefore entitled to a share therein, which must be held to have passed under the mortgage. The seventh defendant has appealed, asserting his claim that these properties are his self-acquisition.

The learned counsel for the respondent has insisted that the lower appellate Court has recorded a finding of fact with which I am not entitled to interfere in second appeal. As I am of opinion that the point of view from which the learned District Judge has approached the consideration of the question is not correct, I cannot accede to this contention of the learned counsel for the respondent.

The trial Court found that though the family of the seventh defendant had a nucleus of ancestral property, the income therefrom would not have been sufficient even for the maintenance of the family. It also found that the seventh defendant was earning a salary as a clerk in some shop. The evidence and the probabilities indicated that to meet the expenses of the family, the seventh defendant must in addition to the income from the family properties have also spent portions of his own salary. These being the facts found by both the Courts, the question is whether on those facts, the properties acquired in the seventh defendant's name in 1897, 1900, 1906 and 1908 can be treated to be or to have become part of the joint properties of the family. In paragraph 4 of his judgment, the learned District Judge has referred to the decisions in *Rajanikanta Pal* v. *Jagmohan Pal*[1] and *Krishnamachariar* v. *Chellammal*[2] as supporting the proposition that the very fact

1. (1923) 44 M.L.J. 561: L.R. 50 I.A. 173: I.L.R. 50 Cal. 439 (P.C.).
2. A.I.R. 1928 Mad. 561.

Sandanam Pillai v. Soma-sundaram Chettiar.

that the seventh defendant utilised a portion of his salary for the maintenance of his family is a strong point in favour of the view that he did not intend to keep his salary as his own separate property and that therefore the acquisitions, taking them to have been made out of the surplus of his salary, must also be treated as having been thrown into the joint stock. I am free to admit that the language in these and certain other decisions is calculated to lend colour to that view. Most of the cases relevant to this question have been discussed in a recent judgment to which I was a party (A. S. No. 229 of 1932) and I need not go over the ground here again. I take the law to be that where there is a nucleus of joint family property, the onus will no doubt be on the father in the first instance to prove that the acquisition of the properties which he claims to be his separate property was not made out of the income from the joint family property. But where, as in this case, it is clear that the income from the joint family properties would not have sufficed even for the maintenance of the family, there is no basis for any presumption that the acquisitions must have been made from out of the income of the joint property. As one conversant with Hindu habits and ideas, I cannot accept the proposition that a father who earns can spend any portion of his earnings for the maintenance of his family only under peril of losing his control even over the balance remaining in his hands. It is only by an overt act leading to an inference of an intention to abandon his control even over the surplus moneys in his hands that an intention to throw that portion of his earnings into the joint stock can be held to be established.

The way in which the lower Court has dealt with the matter practically throws upon the earning member the obligation of showing that he kept his earnings separate, whereas, as I understand the law, the onus is upon the other party to prove that the earning member had relinquished his separate right over his earnings. As I have already stated, the mere fact that he has spent a portion thereof for the maintenance of his family cannot to a Hindu mind suggest the inference that he did not intend to retain even the balance under his control. In paragraph 5, the learned Judge refers to the non-production of accounts by the seventh defendant. It appears that on a previous occasion the seventh defendant stated that he kept accounts, whereas he now denies that he kept any accounts.

Sandanam Pillai *v.* Somasundaram Chettiar.

Having regard to the status of the seventh defendant, I am not by any means certain, whether his former statement is more likely to be true than his present statement, but I do not wish to go the length of expressing a dissent from the learned Judge's view on a matter of this kind. Assuming that the seventh defendant is suppressing his accounts, it does not necessarily follow that the plaintiff has discharged the onus lying upon him. It is well-established that the inference from the non-production of accounts can only be drawn in the light of the other circumstances appearing in the case; and if the income from the joint property would hardly have been sufficient for the maintenance of the family, it does not seem to me that the mere non-production of accounts, from whatever apprehension or motive such a course might have been followed, would warrant the conclusion that these acquisitions by the father must be treated as having been thrown by him into the joint stock.

The result is that the second appeal must be allowed and the decree of the first Court restored with costs here and in the lower appellate Court, payable by the first respondent.

Leave granted.

S. V. V. —— *Appeal allowed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Bombay.]

PRESENT:—LORD ROCHE, SIR JOHN WALLIS AND SIR SHADI LAL.

Sardar Vinayakrao Dhundiraj Biwalkar .. *Appellant** (*Plaintiff*)

v.

The Secretary of State for India in Council .. *Respondent* (*Defendant*).

P.C. —— Sardar Vinayakrao Dhundiraj Biwalkar *v.* Secretary of State for India in Council.

Inam tenure—Grant by Government—Conferment of benefit from generation to generation—Whether constitutes an act of grace on the part of sovereign power—Right to benefit if enforceable in Civil Court—Long enjoyment of right—Presumption as to lawful origin—Bombay Revenue Jurisdiction Act (X of 1876), S. 4—Applicability.

The plaintiff's ancestor held the office of Dewan of the Kolaba State from 1802 until the annexation by the East India Company in 1840, and in reward for his service he obtained two separate grants, one for himself, and another for himself and his associates. The first grant of the village of *K* on 25th January, 1816, was an ordinary inam grant. The second deed of

* P. C. Appeal No. 56 of 1935. 29th July, 1936.

P.C.

Sardar Vinayakrao Dhundiraj Biwalkar *v.* Secretary of State for India in Council.

grant of other villages dated 26th January, 1816, stated as follows:—"Considering that what has been given to you should go on from generation to generation a nemnook is granted to you in inam. The details are as follows: Cash amount Rs. 7,002. Nemnook to you". Then after setting out the other nemnooks to his associates the deed stated as regards Vinayak that—"For the actual payment of the nemnook the following villages in Taluka Manikgad are allotted." In 1818 the plaintiff's ancestor obtained the further security of a guarantee from East India Company of the continuance of those grants, as, also, of a cash allowance of Rs. 2,000 payable by the Treasury, and of payment of the State's indebtedness to him. The relations of the State with the paramount power were regulated by Art. 6 of the Treaty of 1882, which recited the guarantee as "a guarantee to Vinayak and his associates of certain villages and lands of the value of Rs. 15,001 as per the annexed list which the Company's Government had undertaken to the said Vinayak "his heirs and successors, together with certain other persons therein named." The plaintiff's predecessors had been in enjoyment of the rents and profits of guaranteed villages and lands in the same way as other inamdars down to 1917. The plaintiff on the 20th June, 1923, filed a suit for a declaration of title to hold the suit lands as inamdar will full proprietary rights.

It was pleaded on behalf of the Government that if the plaintiff's ancestors were allowed to retain any of the said lands or villages in their possession it was done as an act of grace, and more for the convenience of the Company's administration than as a recognition of any rights of the plaintiff's ancestors.

Held, on a construction of the grant that the plaintiff was entitled to restoration in full of the inam property held by his predecessor as inamdar; even assuming that inams were sometimes "qualified by the exaction of all proceeds exceeding the intended value of the original assignment", such an exceptional limitation of the ordinary rights of an inamdar should be very clearly proved and in this case it was negatived by the failure to enforce such a reservation for more than a hundred years. Presumption as to lawful origin arising from long enjoyment applied.

Held, further, that in the particular case there was not that element of grace and of precariousness which is attached to such tenures, and that the inam tenure in question was not a tenure of the kind specified in S. 4 of the Bombay Revenue Jurisdiction Act.

Decision of the Bombay High Court reversed.

Appeal from the High Court of Judicature at Bombay dated 15th March, 1933, confirming a decree of the District Judge of Thana dated 4th June, 1927.

Vinayak Purushram was the Diwan of the Kolaba State (situate on the West Coast of India to the South of Bombay) from 1802 until 1840 when the last ruler died and the State lapsed to the British Government through its delegate the East India company. His father had been Diwan from 1796 to 1802. The Government of Bombay, however, maintained that the plaintiff was only entitled to a portion of the recoveries of the lands in suit and denied the plaintiff's title as owner of the soil. They denied his rights to possession as owner and contended that his possession

P.C.

Sardar Vinayakrao Dhundiraj Biwalkar *v.* Secretary of State for India in Council.

was that of a manager only. They further denied his rights as owner of the forests within village limits. They had further prior to the plaintiff's memorial, taken steps to introduce a Survey Settlement in the villages and lands in suit, although there had been no agreement between the plaintiff and the Government for such introduction. On the 20th June, 1923, the plaintiff, after giving the prescribed notice, filed the present suit in the District Court at Thana, wherein he claimed, *inter alia,* full proprietary rights in the lands in suit, inclusive of the forests, and an injunction against the introduction of the Survey Settlement. The defendant resisted the suit on numerous grounds and as a result twenty issues were raised recording the following main questions:—(1) Was the suit barred by the Bombay Revenue Jurisdiction Act (X of 1876)? (2) Was the suit barred by limitation? (3) Whether the grants made by the Chief of the Kolaba State to Vinayak Purushram were grants of the soil? (4) Whether, if so, such grants were recognised by the British Government through its delegate the East India Company on the lapse of the Kolaba State? The suit came on for hearing before the District Judge, Mr. Shannan, who on the 4th June, 1927, delivered judgment deciding all the above questions against the plaintiff and dismissing his suit with costs. Amongst the subsidiary questions decided was the one in regard to whether the defendant had a right to introduce the Survey Settlement. The learned Judge held that in view of the fact that the plaintiff in his memorial to the Government of India had stated that he would "be willing to have his inam villages surveyed and settled according to the rules and regulations in that behalf" that the defendant was entitled to act on the memorial and that no formal application was necessary. The plaintiff appealed to the High Court from the decree of the District Judge. The appeal came on for hearing before Beaumont, C.J. and Rangnekar, J., who on the 15th March dismissed the same with costs. Rangnekar, J., delivered the main judgment, with which Beaumont, C.J., concurred. In the course of his judgment Rangnekar, J., held that the plaintiff had failed to prove a grant of the soil to Vinayak Purushram by the Chief of the Kolaba State and further, in view that the only claim of Vinayak Purushram which the British Government had recognised and decided to continue was a claim to a cash allowance of Rs. 10,002; that such a decision was an act of State; and that whatever prior rights or claims Vinayak Purushram had must be deemed to have been extinguished by such decision. In this view of the case the learned Judge was of opinion that it was unnecessary to express any view on the question of limitation or on the other questions decided by the District Judge, though speaking for himself he considered that there was considerable force in the argument put

P.C.

Sardar Vinayakrao Dhundiraj Biwalkar *v.* Secretary of State for India in Council.

forward for the defendant that the suit was barred by limitation. In his concurring judgment Beaumont, C.J., observed: "I would only add that whilst we agree with the conclusions of the learned Trial Judge, we must not be taken to be agreeing with all the answers by him to the twenty issues which he has raised".

A.M. Dunne, K.C. and *T. J. Strangman* for Appellant.—The plaintiff is entitled to hold the lands on inam tenure, with full proprietary rights in the soil. He was given an assignment of the land itself and not only of the land revenue. The Kolaba State always had the rights in the land being the owners of the land. The sanads conveyed to the grantees the absolute right in the soil. The High Court should not have decided the question in the absence of the relevant documents, with regard to the claim of the plaintiff. It is true that the Government made a search but they did not give the plaintiff notice. The plaintiff ought to have had the opportunity of making a search. Such documents as the Government have produced bear the seal of the Inam Commission, and deal with the villages in respect of which the guarantee was given. Those documents contained grants guaranteed by the British Government to the plaintiff's ancestor, and the villages that were exchanged were to be treated as being within the guarantee. The documents on record prove a grant of the soil and not only of the land revenue. The guarantee is in the treaty itself between the British Government and the State of Kolaba. Aitcheson's Treaty, 1892 edition, p. 380, accompaniment E to the Treaty of 1822 between the Chief of the Kolaba State and the East India Company and Art. 6. The grants were recognised by the British Government through its delegates the East India Company when the State of Kolaba lapsed to the British Government to such delegates. None of the defences sought apply if there was an inam grant. [Refers to Treaties and Engagements, Vol. 7, pp. 426, 429 (Sanads) and to Act XVII of 1871, and to *Vajesingji* v. *Secretary of State*[1], *Secretary of State for India in Council* v. *Srinivasa Chariar*[2] and *Ramchandra Mantri* v. *Venkatrao*[3].] The suit is not barred by S. 4 of the Bombay Revenue Jurisdiction Act (X of 1876).

L. De Gruyther, K.C. and *W. Wallach* for Respondent.—The original grant was the grant of a nemnook of Rs. 8,002 annually out of the revenues of the villages and Rs. 2,000 annually payable out of the Public Treasury and was not a grant of the villages in dispute. Irrespective of the nature of the interest originally conferred the only claim now maintainable is on the interest conferred by the East India Company and no interest in the soil was

---

1. (1924) 47 M.L.J. 574: L.R. 51 I.A. 357 at 360, 361, 367: I.L.R. 48 Bom. 613 (P.C.).
2. (1920) 40 M.L.J. 262: L.R. 48 I.A. 56 : I.L.R. 44 Mad. 421 (P.C.).
3. (1882) I.L.R. 6 Bom. 598, 601.

P.C.

Sardar Vinayakrao Dhundiraj Biwalkar *v.* Secretary of State for India in Council.

Lord Roche.

conferred by that company. The Government never had the sanads relied upon by the plaintiff. The Civil Court was barred from entertaining the suit by the Bombay Revenue Jurisdiction Act, 1876, S. 4 (*a*).

29th July, 1936. Their Lordships' judgment was delivered by

LORD ROCHE.—This suit was instituted by the plaintiff in the District Court at Thana against the Secretary of State for India in Council for a declaration that he is the inamdar and owner of the soil and has full proprietary rights in the suit lands, and for possession and mesne profits. The District Judge dismissed the suit as to merits and for want of jurisdiction. He also thought that the suit was barred by limitation of time. The judgment of the Bombay High Court affirmed his decision as to merits and dismissed the appeal without deciding the questions of jurisdiction or limitation.

The plaintiff claims under grants made to his ancestor Vinayak in the earlier part of last century by Raghoji Angria, the Ruler of the Kolaba State, which had formed part of the territories extending from Bombay to Goa over which the notorious Kanoji Angria established his rule in 1713. For more than forty years he and his descendants carried on a piratical war against shipping in the Indian Ocean until they were finally suppressed by Lord Clive and Admiral Watson in 1756. The northern portion of these territories forming the Kolaba State and adjoining the Bombay Presidency managed to survive as a feudatory of the Peishwa, and in 1802 Vinayak Purusram the plaintiff's ancestor succeeded his father as Dewan of the State and held that office until the annexation in 1840. In 1816 in reward for his services he obtained two grants, one on the 25th January of the inam village of Kaproli for himself and on the following day another grant for himself and his associates. He may well have considered that it was better to have two separate grants, as if the second and larger grant were resumed at any time, the village of Kaproli might be left to him. He was doubtless aware that these grants in whatever terms they were expressed, were liable to resumption; and in 1818 having in the meantime rendered signal services, not only to the Kolaba State, as recited in the correspondence, but also to the East India Company by preventing his State from joining the Maharatta confederacy in the war against the

P.C.
Sardar Vinayakrao Dhundiraj Biwalkar *v.* Secretary of State for India in Council.
Lord Roche.

Company which ended in the annexation of the Peishwa's territories in 1818, he obtained the further security of a guarantee from the Company of the continuance of the grants already mentioned, as, also, of a cash allowance of Rs. 2,000 payable by the Treasury, and of payment of the State's indebtedness to him.

This undertaking of the paramount power to prevent the exercise of the power of resumption was of value especially in the event which has happened of the large areas of waste land then existing in so many villages being brought under cultivation. In this case between 1844 and 1917 owing to the industry and good management of the grantees the area under cultivation has doubled and the income trebled as may be gathered from the fact that in 1917 the area is found to contain 16 villages instead of eight as in 1840, and according to the estimate of the District Judge the income has risen to Rs. 25,000. The Ruler, however, accepted the restriction and helped in bringing it about. The Company was willing to give these guarantees, no doubt on the advice of Mr. Mountstuart Elphinstone who had been Resident at the Peishwa at the outbreak of hostilities and was in charge of the annexed territories and knew all the circumstances. The matter having been arranged, the two letters of the 4th and 11th April, 1818, were exchanged between Raghoji Angria and Mr. Elphinstone. Angria's letter asked that Vinayak and his associates were to be duly protected as to the allowances and inams granted to them and their heirs as shown in a memorandum of assignments forwarded with the letter and as to the indebtedness to Vinayak and requested the Company to satisfy Vinayak on these points. Mr. Elphinstone's reply, omitting the end of the letter referring to the debts, was as follows:—

"I have received your letter dated the 27th Jumadyoolavul (4th April 1818), noticing that Vinaik Purusram, the Deewanjee, having, during the administration of the late Manajee Angria, been extremely useful, and having preserved the State of Colaba by maintaining the alliance with the Honourable Company, when Bajee Row subsequently broke with the Honourable Company and commenced hostilities, *certain allowances and enams had* been granted to him, as well as to Bapoojee Bullal and others connected with him, by the Government of Colaba, as detailed in a separate memorandum, which were to be enjoyed by the respective parties and their heirs unmolested, even though the said Deewanjee should no longer act in the administration, that his claims against the State should be satisfied according to what might appear to be justly due, and that he should be protected by it, whenever occasion might render such protection necessary, requesting, at the same time, that the Honourable Company's Government satisfy him on these points. In conse-

P.C.

Sardar Vinayakrao Dhundiraj Biwalkar *v.* Secretary of State for India in Council.

Lord Roche.

quence of this application, I have affixed my signature as *guarantee to the memorandum of the enams and allowances granted to* him and to his dependants, which was transmitted under your Mortub (Seal), amounting to Rs. 15,001".

Angria's letter, the memorandum of assignments and Mr. Elphinstone's reply were afterwards made annexures A, B and D to Art. 6 of the Treaty of 1822 regulating the relations of the State with the paramount power.

The guarantee was recited in Art. 6 of the Treaty as "a guarantee to Vinayak and his associates of certain villages and lands of the value of Rs. 15,001 as per the annexed list (annexure C) which the Company's Government had undertaken" to the said Vinayak "his heirs and successors, together with certain other persons therein named."

The interpretation of the grant guaranteed to Vinayak himself is one of the principal questions in the case, but before dealing with it their Lordships think it desirable to set out the circumstances which resulted in the institution of this suit. As will be seen, for more than seventy years after the annexation of the Kolaba State by the Company which took place in 1840 the plaintiff's predecessors had been in enjoyment of the rents and profits of guaranted villages and lands in the same way as other inamdars down to 1917. Inam tenure is one of the oldest and most widespread land tenures in India. In the Fifth Report of the Committee of 1812 it is stated that from the very earliest times Indian Governments had been in the habit of granting lands with a total or partial remission of land revenue described as enams to the humble village servants in every village as well as to its revenue officers and to religious and charitable institutions. Before the beginning of last century lands held under these grants had come to be known in Bengal as lakiraj or revenue free lands, and in most parts of India as "inams" (then spelt "enams"), a Persian word meaning reward or favour. The events which happened as to the lands now in question at and after the date of the annexation in 1840 will be discussed later in this judgment. It is sufficient to say now that although in 1880 when Vinayak's son died the Bombay Government recognised his widow's right to succeed to his estate, they intimated that they would not admit the right of succession of any son she might adopt. On her death in 1917 they resumed the lands held under the grant offering at the same time to make some provision for her adopted son,

P.C.
Sardar Vinayakrao Dhundiraj Biwalkar v. Secretary of State for India in Council.
Lord Roche.

the plaintiff, as an act of grace. Thereafter on the 25th November, 1918, the plaintiff presented a memorial to the Government of India who dealt with the memorial in a letter to the Government of Bombay dated 9th January, 1920. As stated in that letter, in view of the opinion of the Advocate-General of Bombay forwarded to them on the 12th September, 1919, "the Government of India did not see how the memorialist's claim to the restoration of the inam grant in full could be resisted, but before issuing orders would be glad to know whether His Excellency (The Governor of Bombay) in Council had anything to urge against this course." On the 9th April, 1920, the Bombay Government replied that they had nothing to urge against the issue of orders admitting the plaintiff's claim to succeed to the inam property held by his adoptive mother, which apparently meant no more than that they had nothing further to say—at least officially. The Government of India thereupon passed the following order:—

"I am directed to refer to the correspondence resting with Mr. Knight's letter No. A-54, dated the 9th April, 1920, and to say that after careful consideration of the facts represented by Meherban Vinayakrao Dhundiraj Biwalkar, Inamdar and First Class Sardar of the Deccan, in his memorial dated the 25th November, 1918, and of the previous history of this case, the Governor-General in Council considers that the claim made by the memorialist to succeed to the whole of the Inam property held by the late Umabai Saheb widow of Dhundiraj Vinayak Biwalkar, as her adopted son should be admitted.

"2. I am to request that necessary action may be taken by the Government of Bombay to give effect to this decision in such manner as they may think fit and that the memorialist may be informed."

Their Lordships are clearly of opinion that in passing this order the Government of India proceeded on the basis that the plaintiff's predecessors had held their lands as inam lands, that is to say as lands in respect of which the Government had alienated to the grantee its land revenue in whole or in part as well as the lands themselves so far as they were the property of the Government.

The Bombay Government, whose refusal to recognise the plaintiff's right of succession had been overruled, took no official action on the order of the Government of India for two years beyond notifying the plaintiff of the decision and then fell back upon the position that the plaintiff's predecessors had never had any inam property which could be restored, as they had never been entitled to more than a fixed money payment out of the land revenues of the lands specified in his grant, and

P.C.

Sardar Vinayakrao Dhundiraj Biwalkar *v.* Secretary of State for India in Council.

Lord Roche.

in any case that this was the only right recognised by the Company from the time of the annexation. They accordingly proposed to put him in possession of the lands, not as inamdar a title which they dropped, but as a sort of managing member of an estate in which he was a co-sharer with the Government, being entitled to retain Rs. 8,328 out of the collections, which with his money allowances made up the fixed sum of Rs. 10,002, leaving him accountable to the Government for the balance. Their decision was communicated to the plaintiff in the following letter of the 20th June, 1922:—

"With reference to your memorials dated 3rd March, 1921, 24th August, 1921, and 2nd November, 1921, addressed to Government, I am directed by the Governor in Council to inform you that all that you are entitled to is (1) a cash allowance of Rs. 1,674 and (2) a revenue amounting to Rs. 8,328 from lands coming to you on Bai Umabai's death; that the cash allowance will be continued to you; that out of the land revenue of the 16 villages and Khars and 4 Vadis fixed for collection annually according to the Survey Settlements from time to time in force and the provisions of the Land Revenue Code, you will be allowed to retain Rs. 8,328 and that you should refund the balance annually to Government and that your position will be that of a sharer in the revenue of the villages and all increases whether in agricultural or non-agricultural assessment will go to Government.

"2. As regards the management of the villages, you will be allowed to retain the management and to appoint your own village accountants on condition that you maintain all the necessary village forms. The work of the village accountants whose cost will be borne by Government will be subject to the supervision of the Revenue Officers."

The plaintiff was not satisfied with the offer of the Bombay Government and submitted a further memorial to the Government of India on the 23rd November, 1922; and then without waiting for the reply to his memorial on the 20th June, 1923, filed the present suit for a declaration of title to hold the suit lands as inamdar with full proprietary rights.

As he had applied to the Civil Courts for an adjudication on his claims, the Government of India not unnaturally was unwilling to interfere, and on the 5th December, 1923, the plaintiff was informed that, "as he had filed a suit in the District Court, the Government of India would not take any action in regard to his prayer for proprietary rights in the villages in question."

Unfortunately, owing largely to the way the cases for both parties were presented in the pleadings and at the hearings, the plaintiff's suit has been dismissed on the merits without any adequate consideration of his claim to the suit lands as inams which was the basis on which the Government of India directed

P.C.
Sardar Vinayakrao Dhundiraj Biwalkar v. Secretary of State for India in Council.
Lord Roche.

that he should be restored to the whole inam property held by his mother.

As regards the period after the annexation the evidence of recognition of the status of the plaintiff's predecessors as inamdars is not dealt with in either of the judgments, and their conclusion as to the nature of the original grant is in their Lordships' opinion based on questionable inferences from the terms of an old grant of an Indian State which can hardly be regarded as complete, seeing that the sanads ordered to be issued to give effect to it are not forthcoming.

But in endeavouring to meet the plaintiff's claim that he was entitled to hold the lands on inam tenure, with full proprietary rights in the soil, those responsible for the written statement after pleading that the Civil Court had no jurisdiction to entertain the suit, though they did not deny in terms that after the annexation the plaintiff was an inamdar and entitled as such to the possession and full enjoyment of the suit property; yet in effect they raised the point by their plea that the Company had "never recognised the plaintiff's predecessors as having any right to the soil of the said villages or lands or to any forests or waste lands in the said villages." The defence, moreover, felt bound to put forward some explanation of the fact that the plaintiff's predecessors had been in unquestioned possession and full enjoyment as inamdars for seventy years after the annexation. That explanation, such as it is, is to be found in paragraph 7 of the written statement which is as follows: "If the Government allowed the plaintiff's ancestors to retain any of the said lands or villages in their possession, it was done as an act of grace, and more for the convenience of the Company's administration than as a recognition of any rights of the plaintiff's ancestors." This is an amazing plea, and is really tantamount to a reflection on previous Governments and Revenue Officers, as it suggests that they allowed the plaintiff's predecessors to remain in full possession and enjoyment of all the suit property for so long a period without making any demand as an act of grace, while the income of the estate, as already shown, was steadily rising.

Their Lordships will begin by dealing with the original grants in 1816 which were recited and incorporated in the memorandum of 1818. The first grant of the village of Kaproli on the 25th January, 1816, is one of the exhibits

P.C.

Sardar Vinayakrao Dhundiraj Biwalkar *v.* Secretary of State for India in Council.

Lord Roche.

and is admittedly an ordinary inam grant. The other villages are included in the grant of the 26th January, 1816. After reciting Vinayak's services it goes on to say "Considering that what has been given to you should go on from generation to generation a nemnook is granted you *in inam.* The details are as follows. Cash amount Rs. 7,002. Nemnook to you". Then after setting out the other nemnooks to his associates the deed states as regards Vinayak that "*For the actual payment of the nemnook the following villages in Taluka Manikgad are allotted.*" The words "cash amount" which immediately followed the statement that the grant was in inam cannot refer to a fixed money payment, because what was "allotted in payment" of the nemnook were villages of which the total land revenue, of which particulars are set out, was Rs. 7,542 out of which Rs. 540 was payable by Vinayak to Pandrang Singh and his dependants for the nemnooks to them already specified, leaving a balance of Rs. 7,002 which had been entered at the beginning of the deed as "Cash amount. Rs. 7,002 nemnook to you." In a good year he might realise more; in a bad year, where the monsoon failed, little or nothing. It was as if a landowner were to settle on a member of his family land with a rent roll of £1,000 a year. The word *nemnook* on which so much is made to turn in the judgments of the Courts below, means provision, and is large enough to cover provision in land as well as in money; and as, already stated, villages and lands were expressly allotted in payment of Vinayak's nemnook. The Angria Government was no doubt in the habit of granting money payments under that name payable not by the Treasury but out of the land revenue of a particular village under orders to the appropriate land revenue officer, and some of the nemnooks granted to dependants in the assignment of 1818 appear to be of that character. Later grants of villages to Vinayak included in the record also contain reservations in respect of such nemnooks as had been already granted to others. Such nemnooks gave no right to possession nor were they grants of the land, and were very different from the allotment of whole villages in payment of a nemnook.

Even assuming, as stated in Wilson's Glossary under "Inam," that inams were sometimes "qualified by the exaction of all proceeds exceeding the intended value of the original

P.C.

Sardar Vinayakrao Dhundiraj Biwalkar *v.* Secretary of State for India in Council.

Lord Roche.

assignment," such an exceptional limitation of the ordinary rights of an inamdar should in their Lordships' opinion be very clearly proved, and is negatived in this case by the failure to enforce such a reservation for more than a hundred years. There is no such reservation in the Kaproli sanad, and it is even less likely to have been found in the missing sanads of the villages included in the second grant. Nor is there any such reservation in the fresh sanads which, as will be seen, were granted for the suit villages in 1827. Ex. 178 a document bearing date in 1821 which is relied on in the judgment of the High Court, merely provides that the Government was to go on bearing the cost of the collections from the specified villages, a concession which Vinayak was not entitled to but was in a position to obtain, and in their Lordships' opinion has no bearing on the present question. Between 1822 and 1827 some of the lands included in the grant were transferred to the Bombay Presidency in exchange for others, and in place of lands so transferred Vinayak received additional grants in the Kolaba State, which according to Mr. Davies's report much exceeded in value the lands which he surrendered. He was obviously not the man to leave undone anything that could strengthen his position and on the 14th January, 1827, he obtained a further guarantee in respect of the lands received by him in exchange from the Governor of Bombay in Council signed by Mr. Elphinstone as Governor, and also fresh grants from the Angria Ruler as regards the guaranteed villages. The order of the Bombay Government set out particulars of the lands and villages held under the grant after the exchanges and guaranteed them as follows "In accordance with the above memorandum year after year and from generation to generation the villages, lands, etc., will be continued to you." An additional guarantee was then added to article 6th of the Treaty which purports to give effect to the above guarantee, and was made annexure F to the Treaty. Endorsed on the original of annexure F there is yet another guarantee in 1835 by the Bombay Governor in Council, signed by the Governor Lord Clare. After reciting that in 1831 the village of Punade bearing an annual revenue of Rs. 628-10-6 had been assigned by Angria Sarkhel to Vinayak as inam saranjam in exchange for the village of Asud which had been transferred to Bombay, and that Angria Sarkhel had asked for a similar guarantee to be given to the Diwanji, it went on: "accordingly a guarantee for the village

of Manje Punade is hereby given by the Company Government."

Another set of documents obtained in 1827 from the Angria Ruler includes documents—plaintiff's exhibits 134 to 136 being grants of all the villages specified including the guaranteed villages in inam saranjam to Vinayak as revenue-free villages, and uses words "waters, trees, grass, woods, stones, mines and buried treasure" showing an intention to confer full proprietary rights. Exhibit 136 is a further document dealing with the guaranteed grant and entitling the grantee to resume for his own benefit the grants to his associates. Pursuant to these exhibits fresh sanads were issued as regards each of the guaranteed villages containing words purporting to pass full proprietary rights in the soil.

To come to the annexation in 1840 and the settlement which followed, their Lordships are also unable to agree with the findings of the lower Courts as to what then happened. It is in their opinion clear that the Government never purported to repudiate or depart in any way from the guarantees. On the contrary Mr. Davies distinctly states that they were recognised. The first document after the annexation included in the record is a letter from the Court of Directors dated the 9th September, 1843, in which they stated that the report of Mr. Davies the Political Officer on the claims of the late Dewan, "is an extraordinary picture of fraudulent mismanagement and showed that for many years he had appropriated to himself nearly half the revenues of the State." In other words what was contended was that the Dewan had got or taken more than had been granted and guaranteed. In a further report of the 9th December, 1843, Mr. Davies correctly stated the effect of the assignment of 1818 as follows. "To Vinayak Purushram himself inams were assigned valued at Rs. 10,002 per annum, of which Rs. 2,000 in cash was made payable for to Treasury *and the remainder Rs. 8,002 was given in villages.*" On a careful consideration of his lengthy report their Lordships do not find that he questioned the right of the Dewan to the full enjoyment of the inam villages. What he said in paragraph 18 was that by unfair exchanges the Dewan had "enhanced the value of the inams from Rs. 15,001 to Rs. 26,709-12-6." He therefore in paragraph 22 recorded his opinion that the Government was not bound to continue to the Dewan the surplus

P.C.

Sardar Vinayakrao Dhundiraj Biwalkar *v.* Secretary of State for India in Council.

Lord Roche.

inams which are over and above the original grant of the Kolaba Government and are without the guarantee of the Treaty." There is nothing in his report to support the defendant's case that the Dewan never had in any ordinary sense any inams at all. On the 2nd August, 1844, the Bombay Government passed an order in the Political Department on Mr. Davies's report in the following terms:—

"4. As by the Memorandum alluded to in the 6th Article of the Treaty entered into by the British Government with Raghojee Angria of Colaba in July, 1822, the late Dewan is only entitled to a Nemnook of Rupees 10,002-0-0 per annum, the Hon'ble Governor in Council directs me to request that you will inform Vinaik Purushram that to this extent only can Government recognise his claims, and that you have been ordered to attach whatever may be in his possession in excess of the above amount—a measure which you are authorised to carry into effect on the receipt of this letter."

Here the Government apparently accepted Mr. Davies's report that it was only fair that the surplus inams which the Dewan had secured by unfair exchanges over and above the original grant should be resumed, and Vinayak was eventually handed back after attachment the eight villages mentioned in the plaint which are all included in the guarantees of 1827 and 1835 already mentioned with other lands making up a total nemnook or provision of Rs. 10,002, but there is no evidence of any intention that the villages and lands handed back were not handed back as ordinary inams but as villages and lands out of the revenues of which the Dewan was only entitled to a fixed sum of Rs. 10,002. There is nothing to show that in those days the annual rents and profits of the land and villages were much in excess of the assessments, and no question appears to have arisen about them. Far from there being any intention to alter the tenure of the villages the title deeds of 1827 which had been produced by the Dewan were handed back, and for more than seventy years he and his successors were recognised as holding inams and as entitled to all the rents and profits of the lands. All that the Government did in 1844 was to resume certain other inams not now in suit, an act of state at the time of the annexation which cannot be questioned. In 1851 when Vinayak's son claimed that some of the property restored was not yielding enough, he was told by letter of the Bombay Government dated 10th September, 1851, "you must either retain your present lands as a whole or exchange the whole of them for a money payment." The letter was definite and final enough and was acted upon as such. As

P.C.

Sardar Vinayakrao Dhundiraj Biwalkar *v.* Secretary of State for India in Council.

Lord Roche.

regards the full enjoyment of the rents and profits their Lordships find no evidence that it was ever questioned. The objection that the plaintiff's mother as inamdar had no right to the forest produce was not pressed, and was certainly not based on the interpretation of the grant contended for by the defendant, which, so far as appears from the evidence on record was formulated for the first time after the death of the plaintiff's mother in 1917. In conclusion if it had been necessary their Lordships would have been prepared to say that long enjoyment of this inam tenure without question for seventy years raised a presumption that it had a lawful origin; and that presumption has not been rebutted.

For these reasons their Lordships have felt bound to dissent from the decision of the Courts below that the plaintiff is not entitled to restoration in full of the inam property held by his mother as inamdar. That was the opinion of the Advocate-General of Bombay on which the Government of India acted, in ordering the restoration of the whole inam property held by his mother and in their Lordships' opinion the advice then given was correct.

As regards the question of jurisdiction their Lordships conceive that in deciding as to the merits of the case they have in effect decided this question also. If the view of the Courts below as to the merits had prevailed there would have been substance in the point as to jurisdiction. But their Lordships have held that at any rate after the annexation in 1840 and after the subsequent discussion terminating in the restriction of the area of land claimed by the appellant's predecessor but in the confirmation of his claim to the lands now in suit the title of the plaintiff's family to the latter lands has been of a permanent nature and neither precarious nor limited in character. It follows therefore in their Lordships' opinion that the tenure of those lands is not a tenure of the kind specified in S. 4 of the Bombay Revenue Jurisdiction Act. To all of such tenures there is attached an element of grace and of precariousness which on the facts is absent from the tenure of these lands. The decision of the District Judge was based on the view he took of the particular facts of the case namely that there was no grant of the lands at all. Similarly their Lordships are not deciding any general question but are deciding in a contrary sense to the District Judge on the facts as they have found them to exist and to have existed for a very long

P.C.

Sardar Vinayakrao Dhundiraj Biwalkar *v.* Secretary of State for India in Council.

Lord Roche.

period of time. The High Court expressed no opinion at all in the matter of jurisdiction, as was natural if the point was not one independent of the particular facts but falling to be resolved as the merits were resolved. Their Lordships only add one observation as to the words of the Act "lands held under treaty." The treaties material to this case were between the Ruler and the Company and were "*res inter alios acta.*" They strengthened the plaintiff's predecessor in certain rights but were not their source and for nearly one hundred years their force has been spent and they have had nothing to do with this matter. In this respect their Lordships are in agreement with the written statement on behalf of the defendant which in paragraphs 4 and 5 adopts this view of the effect of the treaty and of the annexation. For these reasons in their Lordships' opinion the plea as to jurisdiction fails and as the plea of limitation also fails on the facts and dates the appeal should be allowed. The judgment should be for a declaration only as their Lordships were assured that the authorities would act in accordance therewith without any order for an injunction or other relief. The declaration will be as claimed in the plaint ending with the words "within their limits." The right to possession and to mesne profits follows. The plaintiff should have the costs here and below. Their Lordships will humbly advise His Majesty accordingly.

Solicitors for Appellant: *Hy. S. L. Polak & Co.*

Solicitors for Respondent: *Solicitor, Ind a Office.*

S. P. K. —— *Appeal allowed.*

B. V. V.

PRIVY COUNCIL.

[On appeal from the Judicial Committee of the Privy Council.]

PRESENT:—LORD THANKERTON, SIR SHADI LAL AND SIR GEORGE RANKIN.

Mangal Singh .. *Petitioner*

v.

Emperor .. *Respondent.*

P.C.

Mangal Singh *v.* Emperor.

Judicial Committee Rules, 1925, r. 81—Conviction of murder—Petition for leave to appeal in forma pauperis—*Legal aid—Expenses—Fees of appellant's counsel and solicitors.*

18th January, 1937.

P.C.

Mangal Singh *v.* Emperor.

Upon a petition for leave to prosecute *in forma pauperis* an appeal to the Privy Council against a conviction of murder, which petition prayed, *inter alia*, for an order that the India Office should, besides providing for the expenses of printing and binding the record and the petitioner's case, also pay the fees of counsel and solicitor for prosecuting the appeal,

Held, that, in view of the provisions of r. 81, an order which included a direction that the India Office should pay the fees of the appellant-petitioner's counsel and solicitor was one which the Board could not pronounce.

Petition. On 27th July, 1936, the petitioner, Mangal Singh, was granted special leave to appeal to His Majesty in Council against the judgment of the High Court at Lahore, dated 27th April, 1936, which confirmed the conviction of murder and the sentence of death passed on him by the Court of Sessions Judge of Montgomery on 13th February, 1936.

By the present petition, the petitioner, who was in custody at the Central Jail, Montgomery, stated that he was not worth £25 in the world besides his wearing apparel. He accordingly asked for leave to prosecute the appeal *in forma pauperis*; that the fees normally payable on the appeal and on this petition should be remitted; and that the India Office might provide for the expenses of binding the record and printing the case, and for the fees of counsel and solicitor for prosecuting the petitioner's appeal.

M. H. Rashid for Petitioner.—This is a capital case, a question of life and death. In Great Britain, the Court of Criminal Appeal allows legal aid to prisoners.

W. Wallach for Respondent.—The petitioner being admittedly a pauper, the India Office are prepared to pay for the binding of the record and the case. They are in fact prepared to pay for everything except the fees of the petitioner-appellant's counsel and solicitor.

18th January, 1937. Their Lordships' judgment was delivered by

Lord Thankerton.

LORD THANKERTON.—Having referred to the provisions of r. 81,* continued: Counsel for the petitioner appears to be flying straight in the teeth of the rule. The proposal is a novel one to me, or, at least, a most unusual one. I fear that it is not competent. The petitioner is asking for indulgence to appeal as a pauper, and yet wishes to employ counsel at someone else's expense. He is seeking to have the best of both worlds.

---

*R. 81 of the Judicial Committee Rules, 1925, provides as follows:—"Where the Judicial Committee directs costs to be taxed on the pauper scale, the Taxing Officer shall not allow any fees of counsel, and shall only award to the agents out-of-pocket expenses and a reasonable allowance to cover office expenses."

P.C.
Mangal Singh v. Emperor.
Lord Thankerton.

With regard to the legal aid provided to prisoners by the Court of Criminal Appeal in this country, there is statutory provision for it. The petitioner is asking for an order which this Board cannot possibly pronounce.

With the exception of the point with regard to the fees of counsel and solicitor, the petition will be granted.

Solicitors for Petitioner: *Nehra & Co.*

Solicitors for Respondent: *Solicitor, India Office.*

R.C.C. *Order made.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VARADACHARIAR.

Marwadi Vannaji (deceased) and others .. *Appellants* (Plaintiff and his legal representative)*

v.

D. H. Ranga Rao and others. *Respondents (Defendants).*

Marwadi Vannaji v. Ranga Rao.

Civil Procedure Code (V of 1908), O. 32, r. 7—Suit on a document of mortgage with conditional sale—Execution by defendants and also on behalf of minor—Plea by minor that mortgage not binding on his share of properties—Personal decree against minor—No exoneration—Court guardian not prevented to enter a compromise or arrangement on behalf of a minor defendant.

A suit was filed by the plaintiff for recovery of possession of a property on foot of a document which purported to be a deed of conditional sale executed by defendants 1 to 3 and by the first defendant as guardian of his minor son the fourth defendant. The document was executed in discharge of an amount due to the plaintiff on a previous mortgage which had been already executed by defendant to plaintiff. On a suit brought to enforce that mortgage the lower Court had held that the mortgage *qua* mortgage was not binding on the shares of the 3rd and 4th defendants in their ancestral property; but it had found the mortgage to have been supported by consideration. It also found that the right to apply for personal decree was not barred by time though the application for that was directed to be postponed to a later stage than that of the sale of the shares of the first two defendants. The trial Court treated the second document as constituting a mortgage by conditional sale and gave accordingly only a decree for foreclosure. The fourth defendant who was represented in the suit by a Court guardian claimed that his share should be excluded on the ground that the mortgage with conditional sale was not binding on his share.

Held, (1) that it was incorrect to state that the fourth defendant had been exonerated by the previous decree on the mortgage. Since there was

---

* S. A. No. 1176 of 1932. 8th January, 1937.

no suggestion of the debt being illegal or immoral and in the circumstances where it would be proper to pass a decree even against minor sons of the mortgagor to the extent of a money decree against their interests in the joint family property, the fourth defendant's liability for the debt would be enforceable.

(2) That there was no justification for extending the provisions of O. 32, r. 7, Civil Procedure Code, by analogy or considerations of policy to govern the present case. The disability imposed by that rule applied only to a father who was also the guardian *ad litem* to his minor son. But in the present case the fourth defendant was not represented by the father but by the Court guardian.

Ramalingam Chetty v. *Radhakrishnan Chettiar,* (1935) 70 M.L.J. 700, referred to.

Second appeal against the decree of the District Court of Bellary in Appeal Suit No. 138 of 1931 preferred against the decree of the Court of the Subordinate Judge of Bellary in O. S. No. 4 of 1930.

A. Gopalacharlu for Appellants.

K. Sreenivasa Rao for Respondents.

The Court delivered the following

JUDGMENT.—This second appeal arises out of a suit for recovery of possession on foot of Ex. A which purports to be a deed of conditional sale executed on 26th February, 1929, by defendants 1 to 3 and by the first defendant as guardian of his minor son the fourth defendant. Ex. A was executed in discharge of the amount due to the plaintiff on foot of a mortgage which the first defendant had already executed to him. On a suit brought to enforce that mortgage (O. S. No. 1 of 1926) the Court had held that the mortgage was not *qua* mortgage binding on the shares of the present 3rd and 4th defendants in their ancestral property as it had not been given to secure an antecedent debt. The Court however found that the mortgage was supported by consideration. It also found that the right to apply for a personal decree was not barred by time but the application for a personal decree was directed to be postponed to a later stage, presumably till after the sale of the shares of defendants 1 and 2 as directed by the mortgage decree. Ex. A was executed at a time when some of the properties had been sold in execution of that mortgage decree and an application to set aside that sale under O. 21, r. 90 was pending. No serious attempt has been made to show that on the merits the transaction evidenced by Ex. A was improper or

Marwadi Vannaji *v.* Ranga Rao.

prejudicial to the interests of the family or to the interests of the fourth defendant. It appears that on the execution of Ex. A the decree in O. S. No. 1 of 1926 was treated as discharged. An objection taken in this suit on the ground that satisfaction has not been formally entered up has rightly been disregarded by the Courts below.

Though Ex. A purports to be in terms of a sale and the plaintiff filed the suit as one for possession, the trial Court treated Ex. A as constituting a mortgage by conditional sale and accordingly gave only a decree for foreclosure. The fourth defendant appealed and claimed that his share should be excluded on that ground that Ex. A was not binding on his share. The learned District Judge has acceded to that contention because he was of opinion that the case was really governed by the provisions of or at least the principle underlying O. 32, r. 7, Civil Procedure Code. I am not able to agree in this view.

I may at the outset observe that the learned District Judge is not correct in stating that the fourth defendant was *exonerated* by the decree in O. S. No. 1 of 1926. All that was held was that the mortgage *qua* mortgage was not binding on the minor but the plea that there was no consideration for the mortgage had been overruled and there was no suggestion that the debt, if true, was illegal or immoral. It is common knowledge that in circumstances of that kind, it is usual to pass a decree even against the minor sons of the mortgagor to the extent of a money decree against their interests in the joint family property. In this case, however for some reason or other, the application for the money decree, though filed even before the mortaage decree was passed, appears to have been by consent of parties postponed to be dealt with at a later stage. These facts certainly do not amount to an exoneration of the fourth defendant from liability for the debt. That is why, as I stated already, there is no serious suggestion that Ex. A is an improper transaction on its own merits.

The learned District Judge's view that Ex. A must be held bad as contravening the provisions of O. 32, r. 7, Civil Procedure Code, is not supported by the language used by the Privy Council in *Ganesha Row* v. *Tuljaram Row*[1]. The disability imposed by that rule will apply only to a father who is also

1. (1913) 25 M.L.J. 150: L.R. 40 I.A. 132: I.L.R. 36 Mad. 295 at 303 (P.C.).

the guardian *ad litem* for his minor son. But in the present case the fourth defendant was represented not by the father but by a Court guardian. This distinction has been pointed out in a recent judgment of this Court in *Ramalingam Chetty* v. *Radhakrishnan Chettiar*[1], where some of the cases cited before me on behalf of the respondents have also been noticed. It may be that, where the Court has reason to think that a person who is not formally on record as guardian *ad litem* had entered into a transaction on behalf of the minor only with a view to circumvent the provisions of O. 32, r. 7, the Court will not allow such circumvention or, at any rate, take particular care to scrutinise the transaction. In *Gurmallappa* v. *Mallappa Martandappa*[2] one of the learned judges rightly laid some stress on the fact that the transaction entered into by the natural guardian was the very one which had been submitted to the Court for sanction by the guardian *ad litem* but not sanctioned by the Court. It may also be conceded that for the purposes of the very litigation in which the minor is a party to the Court which is seized of that litigation will not record any compromise entered into by a person other than the minor's guardian *ad litem*. That is the principle underlying the decision in *Vijaya Ramayya* v. *Venkatasubba Rao*[3]. The decision in *Santu* v. *Abhainandan*[4] is based on the fact that the paternal uncle who purported to enter into a compromise on behalf of a minor did so not by virtue of his authority as natural guardian of the minor but only on behalf of the guardian *ad litem* who was another nephew of his. I do not think there is any justification for extending the provisions of O. 32, r. 7, Civil Procedure Code, by analogy or on considerations of policy.

The second appeal must therefore be allowed and the decree of the first Court restored with costs here and in the lower appellate Court. In the circumstances time for redemption will be extended by four months.

And this case having been set down to be spoken to this day, the Court made the following

ORDER.—As the second appeal has been allowed the direction in the lower appellate Court's decree that the plaintiff should pay a portion of the Court-fee payable on the memo-

---

1. (1935) 70 M.L.J. 700.
2. (1919) I.L.R. 44 Bom. 574.
3. (1915) 30 M.L.J. 465: I.L.R. 39 Mad. 853.
4. A.I.R. 1925 All. 32.

Marwadi Vannaji v. Ranga Rao.

randum of appeal to that Court should be omitted and a direction to the effect that the whole court-fee payable to Government on the memorandum of appeal to the lower appellat Court should be paid by the fourth defendant should be substituted.

Leave to appeal is granted.

K.C. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW.

T. Sreeramamurthy and others .. *Petitioners** (*Accused 1 to 5*)

v.

T. Ranganayakulu, Honorary Secretary, Krishna District, Sarada Act Committee .. *Respondent* (*Complainant*).

Sreeramamurthy v. Ranganayakulu.

*Child Marriage Restraint Act (XIX of 1929), Ss. 5 and 6—Marriage celebrated at Frenchpet—Conviction for offence of child marriage—*Bona fide *doubt as to Frenchpet being French territory—Whether can be pleaded as defence—Act as having extra territorial effect.*

The Child Marriage Restraint Act makes it an offence to celebrate a child marriage. This penal law applies not only to the celebration of such marriages within British India by anyone but also to the celebration of such marriages even outside British India by native Indian subjects. Where certain persons who were convicted of offences under Ss. 5 and 6 of the Child Marriage Restraint Act pleaded that at the time of marriage it was doubtful if the place of the marriage, namely, Frenchpet, was part of British India, and that consequently they were not liable to be convicted.

Held, that the Child Marriage Restraint Act was extra territorial in its operation, and that, even assuming the accused were labouring under a mistake of fact that Frenchpet was French territory, such a mistake was no defence to the prosecution and conviction of the accused.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of Session of the Kistna division at Masulipatam in Criminal Appeal No. 5 of 1936 preferred against the judgment of the Court of the District Magistrate of Kistna in C. C. No. 13 of 1935.

Burra Satyanarayana for Petitioners.

The Public Prosecutor (*L. H. Bewes*) on behalf of the Crown.

Respondent not represented.

---

* Cr.R.C. No. 458 of 1936. 8th December, 1936.
Cr.R.P. No. 414 of 1936.

Sreeramamurthy v. Ranganayakulu.

The Court made the following

ORDER.—The petitioners in this case were convicted by the District Magistrate of Kistna, the first four of them under Ss. 5 and 6 of the Child Marriage Restraint Act of 1929 and the remaining one under S. 5 of that Act and sentenced to pay fines. Their convictions were confirmed in appeal by the Sessions Judge though the fines were reduced in the case of some of them.

The only point argued in this revision petition is that the proceedings in the Court below were void *ab initio* because they were instituted prior to the declaration by the Government that the locality in which the marriage took place, namely, Frenchpet in Masulipatam, was part of British India. The marriage itself was celebrated in Frenchpet. It was declared by the Advocate-General in a case last year in this Court that Frenchpet was part of His Majesty's dominions and this declaration was accepted by the Bench which heard the case. The marriage in the present case was no doubt celebrated before this declaration was made and it is contended at that time it was generally believed that Frenchpet was not part of British India but was French territory. Even assuming that the petitioners were labouring under a *bona fide* mistake of fact that Frenchpet was French territory, it does not follow that their convictions are wrong or the proceedings in the Court below are void. A mistake of fact like this can be pleaded successfully only if on account of such mistake an act which otherwise would be an offence ceases to be an offence. The question therefore is whether the petitioners can say that they have not committed an offence punishable under the Child Marriage Restraint Act simply because the commission of the offence was in what they believed to be French territory. I am of opinion that they cannot do so because the Child Marriage Restraint Act makes it an offence to celebrate a child marriage. This penal law applies not only to the celebration of such marriages within British India by any one but also to the celebration of such marriages even outside British India by native Indian subjects. S. 3 of the Penal Code provides that:

"Any person liable, by any law passed by the Governor-General of India in Council, to be tried for an offence committed beyond the limits of the said territories shall be dealt with according to the provisions of this Code for any act committed beyond the said territories in the same manner as if such act had been committed within the said territories".

Sreerama-murthy *v.* Ranga-nayakulu.

Reference may be made in this connection also to Ss. 186 and 188 of the Code of Criminal Procedure. The Penal Code as well as the Child Marriage Restraint Act are extra territorial to this extent, namely, that if native Indian subjects like the petitioners commit offences punishable under these laws even outside British India, they are liable to be tried and punished when found in British India. The mistake of fact under which the petitioners are said to have laboured does not have the effect of rendering the celebration of the child marriage in question innocuous or innocent. The Child Marriage Restraint Act, 1929, can pursue them even when they have broken that law after going outside British India, and *a fortiori*, after going to a place which they believed to be not part of British India but is really part of British India. I am of opinion therefore that there is nothing illegal in the convictions of the petitioners, and I am not prepared to reduce the fines imposed upon the petitioners in the circumstances of the case. The petition is therefore dismissed.

B. V. V. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VARADACHARIAR.

M. Ratna Mudaliar (deceased) and four others .. *Appellants* (2nd Defendant and nil)*

v.

Krishna Mudaliar and another .. *Respondents (Plaintiff and 1st Defendant).*

Ratna Mudaliar *v.* Krishna Mudaliar.

Hindu Law—Plaintiff not born of the same male ancestor as the propositus's paternal aunt's son—Preferential claim whether existing in the plaintiff as against the other—Considerations—Direct descent in the male line necessary for sagotra sapindaship—Analogy of succession as between dancing girls not proper.

S, who was the last male owner, was the son of *P*, whose father *K* was in turn the son of *P* the senior; *P* the senior, had a brother *M*, who was plaintiff's father. The finding was, as between *M* and *P*, the senior, they were the sons of the same mother *V* but that their paternity was not known as *V* was not a married woman or even a permanent concubine of any known person. It was alleged and not disputed that *K* had two daughters, one of whom left one or more sons who were alive. Two questions for decision were (1) whether plaintiff could at all claim to be an heir to *S* and (2)

---

* S. A. No. 1332 of 1932. 24th November, 1936.

whether he was the nearest presumptive heir, *i.e.*, one entitled to succeed in preference to the son or sons of *K's* daughters,

Held, that even assuming that *M* and *P* the senior, could claim to be heirs to each other and assuming further that plaintiff could claim to be an heir to the legitimate male descendants of *P* the senior, *K's* daughter's son, who was in the position of a peternal aunt's son to *S* the propositus, which meant he was an *atma bandhu* about whose heirship in general there could be no question, could not be superseded by the plaintiff who could not be said to be born of a common ancestor along with *S*. The only possible ground on which the plaintiff could succeed in preference to *S's* paternal aunt's son would have been on the claim of sagotra sapindaship, *i.e.*, descent in an unbroken male line from a common male ancestor, which had not been made out.

Viswanatha Mudali v. *Doraiswami Mudali*, (1925) 49 M.L.J. 684 : I.L.R. 48 Mad. 944, considered and distinguished.

(2) that no analogy could be drawn in the present case from decisions relating to the succession of property as between dancing girls.

Narayan Pundlik v. *Laxman Daji*, (1927) I.L.R. 51 Bom. 784, referred to and distinguished.

Appeal against the decree of the District Court of Salem in A. S. No. 7 of 1924 preferred against the decree of the Court of the Additional District Munsiff of Salem in O. S. No. 373 of 1922 (O. S. No. 852 of 1919 Principal District Munsiff of Salem).

S. Ranganatha Aiyar for Appellants.

S. S. Ramachandra Aiyar and *S. Ramanathan* for Respondents.

The Court delivered the following

JUDGMENT.—This second appeal raises an important question of Hindu Law. The plaintiff, claiming to be the reversioner to the estate of one Shanmuga, filed a suit for a declaration that an alienation made by the first defendant, the mother of Shanmuga, in favour of the second defendant was not binding on the reversion. The first issue in the case raises the question whether the plaintiff is the nearest reversioner entitled to succeed after the death of the first defendant. The decision of this question turns upon the following facts.

Shanmuga, the last male owner, was the son of one Palaniyandi, whose father Kunjan was in turn the son of another Palaniyandi who may be referred to as Palaniyandi the senior. Palaniyandi the senior had a brother Muthu who was the plaintiff's father. The case has proceeded on the footing that the plaintiff is a legitimate son of Muthu and that the descen-

Ratna Mudaliar v. Krishna Mudaliar.

dants of Palaniyandi the senior were also his legitimate descendants. But, as between Muthu and Palaniyandi the senior, the finding is that they were the sons of the same mother Valliammal but that their paternity is not known, as Valliammal was not a married woman nor the permanent concubine of any known person. It was alleged by the defendants and not disputed that Kunjan had two daughters one of whom has left one or more sons who are alive. On these facts two questions are comprised in the first issue, namely, (1) whether the plaintiff can at all claim to be an heir to Shanmuga, and (2) whether he is the nearest presumptive heir, *i.e.*, one entitled to succeed in preference to the son or sons of Kunjan's daughter.

The District Munsiff in paragraph 7 of his judgment expressed himself in a way which does not make it quite clear whether he thought that the plaintiff was not an heir at all or he thought that the plaintiff must in any event be postponed to Kunjan's daughter's sons. On appeal, the learned District Judge has held that the decision in *Viswanatha Mudali* v. *Doraiswami Mudali*[1] has decided that the plaintiff is an heir and also in effect that he is a preferable heir to any one who can only claim to be only a *bandhu.* He understood that decision to lay down that the legitimate descendants of the two brothers can claim all the adjuncts of heritability which in the Hindu Law applied to persons who are the legitimate descendants of two legitimate brothers, that is, brothers born of a lawful marriage. In second appeal the question for determination is whether the decision in *Viswanatha Mudali* v. *Doraiswami Mudali*[1] lays down both the above propositions.

I confine myself for the moment to the second of the above questions, namely, whether assuming that Muthu and Palaniyandi the senior could claim to be heirs to each other and assuming further that the plaintiff could claim to be an heir to the legitimate male descendants of Palaniyandi the senior, the plaintiff can also claim to succeed in preference to Kunjan's daughter's sons. The language employed by the learned Judges in *Viswanatha Mudali* v. *Doraiswami Mudali*[1] is no doubt very general and I have therefore examined the

1. (1925) 49 M.L.J. 684: I.L.R. 48 Mad. 944.

Ratna Mudaliar *v.* Krishna Mudaliar.

papers in that case to see whether any question of preference was raised and argued in that case. The parties in that case were not agreed as to the geneology. The defendants no doubt pleaded that Murugesa who was the last male holder had a grand aunt by name Sivabagiam and that Sivabagiam had a son who was alive who, according to them, would be a reversioner. But neither in the judgments of the Courts below nor in the judgment of this Court am I able to find any reference to this aspect of the case and all that I can infer is that the alleged existence of a reversioner nearer than the plaintiff in that case was not established, by proving the relationship alleged in the written statement and that therefore no further notice was taken of that point. The judgment of the trial Court merely discussed the question whether the plaintiff was an heir at all and the appellate Court took the question of the plaintiff's right to maintain the suit to have been finally decided, once it determined that the plaintiff could claim to be an heir. It was the order of remand based on this view that was confirmed by the learned Judges in this Court.

The existence of Kunjan's daughter's son or sons not being disputed in this case, the position here is different. I quite agree that in deference to the decision in *Viswanatha Mudali* v. *Doraiswami Mudali*[1], I must hold that the plaintiff can claim to be an heir to the deceased Shanmuga. If I were free to deal with that question, I should have something to say in respect of certain parts of the reasoning in that judgment, as for instance, the extension of the principle of 'representation' to *obstructed* heritage; but as it is not necessary for the purpose of this case to deal with that question, I am content to assume that that decision is correct and confine myself to the question whether the plaintiff can claim to be a preferential heir even as against Kunjan's daughter's son.

It will be noticed that Kunjan's daughter's son will be in the position of a paternal aunt's son to *Shanmuga* the propositus. That means he is an *Atmabandhu* about whose heirship in general there can be no question. It is no doubt the law that *bandhus* can succeed only after *sagotra-sapindas*. The point for determination therefore is whether the plaintiff can claim to be not merely a *sapinda* of *Shanmuga* but also a *gotraja* or *sagotra-sapinda*. Here again, I shall assume for

1. (1925) 49 M.L.J. 684: I.L.R. 48 Mad. 944.

Ratna Mudaliar v. Krishna Mudaliar.

the purpose of the argument that even *sagotra* relationship is capable of being postulated outside the marriage relationship. But the least that is required to constitute *sagotra-sapindaship* is descent in an unbroken male line from a common male ancestor. In this respect the conception corresponds to the notion of agnatic relationship. I am unable to see how such a connection can be postulated as between two persons of whom we cannot predicate whether they were born of the same father or of different fathers. As shown by the enumeration in placitum 5 of S. 5 of Chapter II of the Mitakshara, we have to start with the great-grandfather or the great-great-grandfather and then bring in his descendants in the male line. It being impossible in the present case to say that the plaintiff and *Shanmuga* were descendants of common *male* ancestor, I must hold that the only possible ground on which the plaintiff can succeed in preference to *Shanmuga's* paternal aunt's sons has not been made out.

The decision in *Narayan Pundlik* v. *Laxman Daji*[1] cannot help the respondent. The learned Judges had not to consider any question of preference in that case. They only hold that a sister of a prostitute has sufficient sapinda relationship or blood relationship to the prostitute to be able to defeat an escheat of the prostitute's property to the Crown. I must add that no analogy can be drawn in the present case from decisions relating to the succession of property as between dancing girls. The rules of customary law applied in that connection come into operation only when the Court has to deal with succession to property belonging to a dancing woman. It is not the law that male members of that community, who have entered into marriage relationship and lived like ordinary house-holders, are governed by the rules of the customary law. I must accordingly hold that the plaintiff is not the nearest presumptive reversionary heir.

It was next argued on behalf of the plaintiff that even if he is not the nearest reversionary heir, the declaratory decree granted by the lower appellate Court must be maintained for the benefit of the reversion generally, and reliance was placed in this connection on the decision in *Govinda Pillai* v. *Thayammal*[2]. It is not disputed that the general principle is that laid down by the Judicial Committee in *Rani Anand*

1. (1927) I.L.R. 51 Bom. 784.
2. (1904) 14 M.L.J. 209: I.L.R. 28 Mad. 57.

Ratna Mudaliar v. Krishna Mudaliar.

Kunwar v. *The Court of Wards*[1]. If allegations had been made in the plaint as to the circumstances under which the nearer reversioners had precluded themselves from maintaining the suit, it might have been possible to consider those allegations on their merits. In *Govinda Pillai* v. *Thayammal*[2] it happened that the nearer reversioners had in fact been made party defendants and proper allegations made against them. Without going so far as to say that the nearer reversioners should be impleaded in a suit brought by the distant reversioner for the benefit of the reversion, I may say it is at least clear that materials must be placed before the Court that can reasonably lead to the inference that the nearer reversioners are colluding or have precluded themselves from suing. The mere fact that the lower appellate Court had granted a declaratory decree is not by itself a ground for maintaining it, when this aspect of the matter was not present to its mind at all. Further, in view of the decisions of the Judicial Committee dealing with the effect of the consent of the nearer reversioner to a widow's transactions, the mere fact that the nearest reversioner had consented to the alienation or was supporting the alienation cannot by itself prove that his conduct was improper. This is an additional reason for insisting upon allegations in the plaint against the presumptive reversioner. The Court will then have an opportunity to consider the effect of the reversioner's consent upon the validity of the alienation itself. The learned counsel for the respondent drew my attention to the fact that a note has been made by the trial Court that one of the paternal aunt's sons was present in Court helping the second defendant and his counsel. For reasons above stated, I am not prepared to draw an inference therefrom that his conduct was improper in the sense contemplated by the Privy Council in *Rani Anand Kunwar* v. *The Court of Wards*[1].

The result is that the decree of the lower appellate Court must be set aside and that of the trial Court restored with costs here and in the lower appellate Court payable by the plaintiff to the second defendant.

Leave to appeal is granted.

K.C. ——— *Appeal allowed.*

1. (1880) L.R. 8 I.A. 14: I.L.R. 6 Cal. 764 (P.C.).
2. (1904) 14 M.L.J. 209: I.L.R. 28 Mad. 57.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE MOCKETT AND MR. JUSTICE LAKSHMANA RAO.

T. Varadarajulu Naidu .. *Accused* in Calendar Case No. 1405 of 1936 on the file of the Chief Presidency Magistrate, Egmore, Madras.*

Varadarajulu Naidu, *In re.*

Criminal Procedure Code (V of 1898), Ss. 195 and 476—During trial of a civil suit, documents found to be fabricated—Complaint by the trial Judge to the police—Charge-sheet against accused under Ss. 471 and 466 of the Indian Penal Code—No complaint in writing by the trial Court under S. 195, Criminal Procedure Code—Order of committal quashed—Officiating Chief Justice passing an order under S. 476, Criminal Procedure Code—Validity of the complaint—Officiating Chief Justice has jurisdiction to pass the order.

During the trial of a civil suit on the file of the High Court, two documents purporting to be certified copies of orders alleged to have been passed in an originating petition were filed on behalf of one of the defendants. The trial Judge, who was the Chief Justice, found the documents were fabricated and used by the defendant knowing them to be such, and the matter was under the directions of the trial Judge reported to the police for necessary action. The police filed a charge-sheet against the accused under S. 471 read with S. 466, Indian Penal Code, and he was committed to the High Court Sessions for trial. There was however no complaint in writing by the High Court as required by S. 195, Criminal Procedure Code, and the order of committal was quashed by the Sessions Judge on the ground that the offence under S. 471, Indian Penal Code, could not be taken cognizance of except on the complaint of the Court in which the documents were given in evidence. The Original Side of the High Court then put up a notice setting out the facts, and the Officiating Chief Justice passed an order under S. 476 directing the Registrar to make the complaint under S. 471 read with S. 466 of the Indian Penal Code. Objection was taken by the accused to the validity of the complaint and on the question (1) whether the complaint preferred in pursuance of an order passed by the Officiating Chief Justice on an office note was an order passed by the Court within the meaning of S. 476, Criminal Procedure Code; (2) whether the Officiating Chief Justice could pass an order under S. 476, Criminal Procedure Code, in a case where no orders were passed under S. 476, Criminal Procedure Code, either by the trial Judge or his successor or the appellate Bench that decided the original side appeal against the judgment in the civil suit; and (3) whether the Officiating Chief Justice would be deemed the successor to the trial Judge who decided the civil suit,

Held, that the complaint required by S. 195 of the Criminal Procedure Code, was the complaint of the Court in which the documents were given in evidence and not of the trial Judge and as pointed out in *Bai Kasturbai* v. *Vanmalidas,* (1925) I. L. R. 49 Bom. 710, when a suit was tried by a Judge of the High Court, the term 'Court' occurring in the section must be taken to mean 'the High Court'. There would be nothing to prevent any Judge of the High Court from dealing with the matter though as a matter of convenience that would seldom be done, and the matter was in this case placed before the

* Cr. R. C. No. 777 of 1936. 15th December, 1936.
Case Ref. No. 50 of 1936.

Varadarajulu Naidu, *In re.*

Officiating Chief Justice, as the trial Judge was absent at the time. It was apparent from the order itself, that it was passed by the Officiating Chief Justice in the exercise of ordinary original jurisdiction. The proper course for the accused was to appeal against the order under S. 476 of the Criminal Procedure Code.

Case referred for the opinion of the High Court under S. 432 of the Criminal Procedure Code, by the Chief Presidency Magistrate, Egmore, Madras in his letter R. O. C. No. 1405 of 1936 dated 9th October, 1936.

K. V. Ramaseshan for *The Crown Prosecutor* on behalf of the Crown.

A. S. Sivakaminathan for Accused.

The Court made the following

Lakshmana Rao, J.

ORDER. *Lakshmana Rao, J.*—This is a reference by the Chief Presidency Magistrate, Madras, and the questions referred are:—

(1) Whether the complaint preferred in pursuance of an order passed by the Officiating Chief Justice on an office note is an order passed by the Court within the meaning of S. 476, Criminal Procedure Code.

(2) Whether the Officiating Chief Justice could pass an order under S. 476, Criminal Procedure Code, in a case where no orders were passed under S. 476, Criminal Procedure Code, either by the trial Judge or his successor or the Appellate Bench that decided the Original Side appeal against the judgment and decree in C. S. No. 542 of 1931.

(3) Whether the Officiating Chief Justice could be deemed to be the successor to the trial Judge who decided C. S. No. 542 of 1931 in the exercise of Original Civil Jurisdiction.

The facts are set out in the order of reference, and briefly stated, they are that during the trial of C. S. No. 542 of 1931 on the file of the High Court, two documents dated 10th March, 1928 and 10th May, 1928, purporting to be certified copies of orders dated 2nd March, 1928 and 26th April, 1928, alleged to have been passed in O. P. No. 38 of 1928 were filed on behalf of one of the defendants. The trial Judge, the present Chief Justice, found that the documents were fabricated and used by Varadarajulu Naidu, one of the defendants in the suit, knowing them to be such, and the matter was, under the directions of the trial Judge, reported to the Police for necessary action. The police filed a charge-sheet against Varadarajulu Naidu under S. 471 read with S. 466,

Varadarajulu Naidu, *In re.*

Lakshmana Rao, J.

Indian Penal Code, and he was committed to the High Court Sessions for trial. There was however no complaint in writing by the High Court as required by S. 195 of the Code of Criminal Procedure, and the order of committal was quashed by Cornish, J., on the ground that the offence under S. 471, Indian Penal Code, cannot be taken cognisance of except on the complaint of the Court in which the documents were given in evidence. The Original Side Office then put up a note to the Officiating Chief Justice setting out the entire facts, and the Officiating Chief Justice passed an order under S. 476 of the Code of Criminal Procedure directing the Registrar to make a complaint under S. 471 read with S. 466, Indian Penal Code. The complaint was filed accordingly and process was issued to the accused. Objection was taken by him to the validity of the complaint and hence this reference.

The order was in terms passed under S. 476 of the Code of Criminal Procedure and the real question is whether the Officiating Chief Justice had no jurisdiction to pass the order. The complaint required by S. 195 of the Code of Criminal Procedure is the complaint of the Court in which the documents were given in evidence and not of the trial Judge, and as pointed out in *Bai Kasturbai* v. *Vanmalidas*[1] when a suit is tried by a Judge of the High Court, the term 'Court' occurring in the section must be taken to mean 'the High Court'. There is nothing to prevent any Judge of the High Court from dealing with the matter though as a matter of convenience this would seldom be done, and the matter was in this case placed before the Officiating Chief Justice, as the trial Judge was absent at the time. The Court may, under S. 476 of the Code of Criminal Procedure, make the complaint on application made to it or otherwise, and it need not hold a preliminary enquiry. Notice to the person proceeded against is not essential, and it is apparent from the order itself, that it was passed by the Officiating Chief Justice in the exercise of Ordinary Original Jurisdiction. There is therefore no substance in the contention that the Officiating Chief Justice had no jurisdiction to pass the order under S. 476 of the Code of Criminal Procedure, and questions 1 and 3 do not arise. The proper course for the accused was to appeal against the order under S. 476 of the Code of Criminal Procedure; and it is queer that objection

1. (1925) I.L.R. 49 Bom. 710.

should have been raised and permitted before the Magistrate. The reference is answered accordingly and the records will be re-transmitted to the Chief Presidency Magistrate for proceeding with the case according to law.

K. C. —— *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VARADACHARIAR.

Elavarthi Venkatanarasimharaju.. *Appellant** (*Defendant*)

v.

M. Siddha Chetty and others .. *Respondents* (*Plaintiffs*).

Madras Estates Land Act (I of 1908), Ss. 125 and 147—Holding owned by two persons—Registered only in one's name—Landlord believing person in possession to be the heir—Arrears of rent—Suits against registered holder—Decrees therein—If binding on the others also—Death of one co-owner—Will by deceased—Legatee—No steps taken by, to notify to landholder—Later sale by legatee—Decree obtained against registered holder—Transfer not notified to or recognised by landholder—Decree binds legatee as also transferee—Mortgage by ryot prior to Estates Land Act—Later mortgage after Act to repay earlier loan and extra advance—Invalid—Decree on later mortgage—Decree-holder purchaser—Landholder bound by the earlier mortgage and rent sale subject to rights under earlier mortgage.

If a landlord finding a person in possession *bona fide* believed that person to be legally in possession as *heir* of the last holder and that person further happens to be entitled to an undivided share in the holding, the other persons entitled to the remaining shares cannot treat the proceedings taken against the *registered* holder as a nullity so far as they are concerned, when with the knowledge of the landlord's conduct they have chosen to stand by.

Where *G* and *S* were jointly entitled to portions of a holding, which was however registered only in the name of *G*, and on the death of *S*, her legatee *N* took her properties but did not take steps to bring his rights to the notice of the landlord, then a decree obtained against *G* for arrears of rent due on the holding binds the interest of *N* and also of transferees from *G* and *N* who have not taken steps under S. 147 to get themselves registered as pattadars.

Where a ryot first mortgaged certain lands in 1904 and again executed another mortgage in 1914 to the same mortgagee in discharge of the earlier mortgage and for an additional advance including other properties also, and in execution of a decree on foot of the later mortgage, the mortgagee himself purchased the properties, the landlord can bring the holding to sale in execution of decrees for arrears of rent only subject to the charge in the mortgagee's favour to the extent of the earlier mortgage of 1904. The later mortgage does not extinguish the earlier mortgage, nor does the fact that a decree has been obtained on foot of the later mortgage make any difference, as a decree on a mortgage is as much an encumbrance within the meaning of S. 125 of the Madras Estates Land Act as the original mortgage itself

There is no question of the plaintiffs being obliged to bring a suit on the original mortgage and therefore the fact that now a suit will be barred on it does not deprive the mortgagee of his priority under S. 125.

Srikanta Sundararamiah v. *Venkatasubbiah,* (1924) 46 M.L.J. 380, followed.

---

* S. A. No. 680 of 1933. 27th October, 1936.

Venkata-narasimha-raju *v.* Siddha Chetty.

Second appeal against the decree of the District Court of Chittoor in A.S. No. 217 of 1931 preferred against the decree of the Court of the District Munsiff of Sholingur in O. S. No. 220 of 1930.

When the defendant (proprietor) was seeking to bring the suit lands to sale in execution of the rent decrees, the plaintiff filed claim petitions in the course of the execution proceedings connected with these petitions before the Special Deputy Collector, Chandragiri, objecting to the sale, etc. The Special Deputy Collector dismissed the claims and hence this suit was filed on 27th February, 1930 before the District Munsif of Sholinghur (1) for a declaration that the lands are not liable to be sold at all in execution of these rent decrees on the ground that the decrees were invalid in law; (2) at least for a declaration that they can be sold only subject to his mortgage of 1904; and (3) for setting aside the claim order. The other facts appear from the judgment but only the following dates are given as they may be useful.

Muthuswamiah died in 1911 and Raghaviah in May, 1914. The first mortgage (Ex. A) was on 5th July, 1904 and the later mortgage (Ex. C) on 4th October, 1914 both in plaintiff's father's favour the consideration for Ex. C being the amount due under Ex. A and the balance cash to re-pay other debts. Ex. C comprised all the properties included in the mortgage Ex. A excluding the 10½ guntas settled on Guruvamma and some other properties also. Exs. D and E were on 29th June, 1914. The will of Subbamma (Ex. F) was dated 2nd April, 1916 and she died a little later in that year. The sale-deed Ex. K was of 17th November, 1917. Of the decrees Ex. II series, Exs. II and II (*a*) were of 20th December, 1917, Exs. II (*b*) and II (*c*)of 1921, II (*d*)of 1925 and II (*e*) of 1928. In 1926 the plaintiffs sued on Ex. C and obtained a decree and in execution purchased the lands themselves. Subbamma was a party only to Ex. II and died pending that suit.

V. Ramadoss and *T. Kumaraswamiah* for Appellant.

V. Ramaswamy Ayyar for Respondents.

The Court delivered the following

JUDGMENT.—A number of questions, some of them by no means free from doubt or difficulty, have been raised in the course of the arguments in this second appeal. I propose to refer to most of them, but it seems to me sufficient for the purpose of the decision of this second appeal to express a final opinion upon only some of them. The other questions I prefer to leave open, because the scheme of the Estates Land Act in

Venkata-narasimha-raju v. Siddha Chetty.

relation to claims preferred on the analogy of O. 21, r. 58, Civil Procedure Code, is very obscure.

The properties in suit are ryoti lands situate in a proprietary village, and in 1904, the tenancy right in them belonged to one Ragaviah and his son Muthuswamy Aiyah. These two persons had executed a mortgage Ex. A, in favour of the first plaintiff's father on the security of these lands. Muthuswamy Aiyah died in 1911 leaving a widow Guruvamma. Raghaviah died in 1914 and this case has proceeded on the footing that all the lands passed by survivorship to Raghaviah on Muthuswamy Aiyah's death. It is stated that Raghaviah left a will whereby he bequeathed the suit properties to his daughter Subbamma but that will has not been produced. We however find that in about a month after Raghaviah's death, there was an arrangement between Guruvamma and Subbamma (by Exs. D and E) whereby Guruvamma was given 10⅓ guntas of land and the rest was taken by Subbamma. It is not clear whether this was only a notional division or whether there was a physical separation of the properties taken by them respectively. The evidence however shows that in the village accounts the whole land had been recorded as in the possession of Guruvamma and the lower appellate Court has accepted the suggestion made on behalf of the defendants that the patta for the whole land stood in Guruvamma's name.

It is clear from Ex. H that the proprietor knew that Subbamma was the legal representative of Raghaviah. Whether he knew his alleged will or not, it is not clear. I therefore see no reason to think that in the matter of the registry of the lands in Guruvamma's name the landlord must have acted in ignorance of Subbamma's right; nor do I see any reason to suspect any fraudulent intention on his part. For all that appears in the evidence, Subbamma and Guruvamma and one Nageswara Aiyah, a brother of Guruvamma, seem to have lived together and lived so amicably down to the end that at her death Subbamma bequeathed all her properties to this Nageswara Aiyah. The probabilities therefore are that Nageswara Aiyah was looking after the properties on behalf of both Guruvamma and Subbamma and that as for some reason the properties had been entered in Guruvamma's name in the village registers, nobody had any objection to its so continuing. It is significant that even after Nageswara Aiyah got the properties under Subbamma's will he took no steps to obtain the registry

Venkata-narasimha-raju *v.* Siddha Chetty.

of that portion of the property in his name. On the other hand, when about a year after Subbamma's death, both Guruvamma and Nageswara Aiyah joined in selling all the properties under Ex. K they accepted their liability for the decree passed under Ex. II and also for the arrears of rent which afterwards came to be covered by the decree Ex. II-A. I have therefore come to the conclusion that the lands must have been entered in Guruvamma's name and patta issued in her name in respect of the whole extent that belonged to Raghaviah with the knowledge and in all probability with the consent of Subbamma and Nageswara Aiyah.

Between 1915 and 1928, the proprietor obtained six decrees for rent (Ex. II series). To only one of those suits did he make Subbamma also a party (Ex. II). Even in that suit, she died during the pendency of the suit and it does not appear that any legal representative was brought on record. The amendment of the rule which enables a Court to dispense with the legal representative of an *ex parte* defendant had not then been introduced and it is therefore difficult to accept the suggestion of the learned District Judge that the mere fact of Subbamma having been impleaded in that litigation will give to that decree a validity which it otherwise will not have, when admittedly she died during the pendency of the litigation and no legal representative of hers was brought on the record. But I do not think it necessary to canvass this position at greater length, because for reasons already given I am of the opinion that in all the above circumstances the landholder was justified in treating Guruvamma as sufficiently representing the estate for the purpose of the suits.

It is true that prior to the Estates Land Act it was the duty of the landholder to find out the person really entitled to the ryoti interest and that under S. 147 of the Estates Land Act of 1908 the landholder was relieved in respect of this duty only in cases of transfers but not in respect of succession. The amendment recently introduced so as to cover cases of succession also has no application to the circumstances of this case. But in determining whether the landlord has properly discharged his duty in finding out the person whom he must treat as a tenant for the purpose of issuing pattas and instituting suits for rent, the principle recognised in *Ramaswamy Chettiar* v. *Oppilamani Chetty*[1] and *Bachu Soorayya* v. *Toomuloori*

1. (1909) 19 M.L.J. 671: I.L.R. 33 Mad. 6.

Venkatanarasimharaju v. Siddha Chetty.

Chinna Anjaneyalu[1], may well be taken into account. The result is that if the landlord finding a person in possession *bona fide* believed that person to be legally in possession as heir and that person further happens to be entitled to an undivided share in the holding it will be scarcely fair to permit other persons entitled to the remaining undivided shares to treat the proceedings taken against the registered holder as a nullity so far as they are concerned, when with the knowledge of the landlord's conduct they have chosen to stand by. I would uphold the learned Judge's view in respect of Exs. II and II-A on the ground above stated and not on the ground adopted by the learned Judge.

The above point of view will make a material difference in the test to be applied in respect of the decrees Exs. II-B, II-C and II-D. The learned Judge has held that these three decrees are nullities because they were obtained only against Guruvamma after the properties had been sold away under Ex. K and Guruvamma had presumably ceased to be in possession. I have grave doubts as to whether the question of the validity of the decrees sought to be executed can at all be raised in these proceedings if they are to be regarded as analogous to claim proceedings. But as it is possible to regard the present suit as a mere declaratory suit independent of the provisions of O. 21, r. 63, Civil Procedure Code, I do not wish to base my decision on this narrow ground. If I am right in the opinion that prior to the date of Ex. K, Guruvamma must be treated as a registered pattadar in respect of the whole extent of the holding and not merely of her $10\frac{1}{2}$ guntas, it will follow that the transferees who took the property under Ex. K will be governed by the provisions of S. 147 of the Estates Land Act. Mr. Ramaswamy Aiyar who appeared for the respondent argued that if proceedings had been taken against Nageswara Aiyah in respect of his share of the holding the principle of S. 147 would be applicable but it will not avail in respect of proceedings taken against Guruvamma. This argument ignores the fact that for at least a year after Subbamma's death Nageswara Aiyah who had become entitled to Subbamma's share as legatee had not taken any steps to bring his rights to the notice of the landlord though as Guruvamma's brother living with her and looking after her affairs he must

1. (1918) 36 M.L.J. 106.

Venkata-narasimha-raju v. Siddha Chetty.

undoubtedly have been made aware that the landlord was treating Guruvamma as the registered pattadar in respect of the whole extent of the holding. I am therefore not prepared to draw a distinction between so much of the holding as belonged to Guruvamma which formed the subject-matter of the conveyance under Ex. K and the rest of the holding which belonged to Nageswara Aiyah which also formed the subject-matter of the conveyance under Ex. K. The reference in Ex. K to the decree in S. No. 1163 of 1915 and to the arrears due for the three faslis which presumably formed the subject-matter of the decree in S. No. 1470 of 1917 undoubtedly put the vendees on notice of the liability of the property purchased by them for payment of rent both past and future. If for several years after this purchase these vendees did not take steps under S. 147 to get themselves registered as pattadars, I do not see any justification for punishing the landlord for his ignorance of the transfer. It is obvious that when it came to his knowledge he had no objection to implead these transferees as well in his suit as he did in Ex. II-E. I am accordingly of opinion that the second appeal must be allowed to the extent of declaring that the appellant is entitled to execute not only the decrees, Exs. II, II-A and II-E, but also the decrees, Exs. II-B, II-C and II-D.

As the memorandum of objections has not been pressed I need not say more than to point out that the above reasoning will itself suffice to justify the dismissal of the memorandum of objections even if it had been pressed.

The other point raised in the second appeal is whether the learned Judge was right in holding that the appellant can bring the properties to sale only subject to the charge in plaintiff's favour to the extent of the amount due under Ex. A. On this point, I am of the opinion that the learned Judge's conclusion is justified by S. 125 of the Estates Land Act. It is true that the mortgage Ex. A has been taken into account in Ex. C, a later mortgage executed by Subbamma in 1914, and Ex. C is more than a mere renewal of Ex. A. But on the principle recognised in *Velayuda Reddi* v. *Narasimha Reddi*[1] and *Sreekanta Sundararamiah* v. *Venkatasubbiah*[2], it seems to me proper to recognise in favour of the plaintiffs the benefit intended to be conferred by S. 125 to the extent of Ex. A. I do not feel compelled to treat Ex. C as *extinguishing* Ex. A to

1. (1916) 32 M.L.J. 263.
2. (1924) 46 M.L.J. 380.

Venkata-narasimha-raju *v.* Siddha Chetty.

the detriment of the mortgagee: nor does it seem to me to make any difference that a decree had been passed on foot of Ex. C. It was recognised in *Venkatarayudu* v. *The Maharajah of Pithapuram*[1], that a decree on the mortgage will be as much an encumbrance within the meaning of S. 125 as the original mortgage itself.

Mr. Ramadoss pointed out that at the present date no suit can be maintained on Ex. A and he contended that on the principle of the decision in *Mahomed Ibrahim Hossain Khan* v. *Ambika Prasad Singh*[2], all rights under Ex. A must be deemed to have come to an end. This position does not appeal to me to be tenable. Ex. A had undoubtedly been acknowledged in Ex. C and the suit brought by the plaintiffs on Ex. C had ripened into a decree. No question therefore arises of the plaintiffs being obliged to bring a suit on Ex. A again. The case is not analogous to that of a puisne mortgagee having been left out from a suit instituted by the prior mortgagee against his mortgagor. It has often been pointed out that the charge created in favour of the landholder by the Estates Land Act in respect of rent is not in the nature of a mortgage and there is no justification for insisting that in a suit by a mortgagee whose mortgage would be saved by S. 125 of the Estates Land Act, the landholder should be impleaded as a party. I am of opinion that the decision of Krishnan, J., in *Sreekanta Sundararamiah* v. *Venkatasubbiah*[3] lays down the correct principle, if I may say so.

I understand that during the pendency of this litigation, the mortgagee had brought the properties to sale in execution of his mortgage decree and the landholder has brought the properties to sale in execution of his rent decrees. It does not seem to me desirable to leave this litigation merely with a declaration of the rights of the parties as they stood at the date of the institution of the suit, because it is bound to lead to further litigation. This is just one of the class of cases where the Court will be justified in taking notice of the events that have happened during the pendency of the suit. It therefore seems to me best in the circumstances to modify the lower appellate Court's decree to the extent above indicated but at the same time send the case back to the Court of first instance

1. (1927) 54 M.L.J. 138: I.L.R. 51 Mad. 774.
2. (1912) 22 M.L.J. 468: L.R. 39 I.A. 68: I.L.R. 39 Cal. 527 (P.C.).
3. (1924) 46 M.L.J. 380.

Venkata-narasimha-raju *v.* Siddha Chetty.

for the rights of parties to be worked out in accordance with the principle laid down in *Sreekanta Sundararamiah* v. *Venkatasubbiah*[1]. In the circumstances I am not disposed to make any order as to costs either in the appeal or in the memorandum of objections.

I only wish to make a passing reference to some of the other questions raised by Mr. Ramadoss though as I have already indicated I do not propose to express any final opinion upon them. It has no doubt been held in *Venkatarayudu* v. *The Maharajah of Pithapuram*[2] and *Suryanarayana* v. *Ramachendrudu*[3] that there is nothing in the Estates Land Act to exclude the applicability of the claim procedure contained in rr. 58 to 63 of O. 21, Civil Procedure Code. It is however noticeable that while S. 89 of the Estates Land Act specifically provides for claims by third parties in cases of distraint of moveable property there is no provision in the body of the Act or in the schedule to applications corresponding to those under O. 21, r. 58, Civil Procedure Code. Mr. Ramadoss raised the question whether assuming the procedure by way of claim petition is to be recognised in connection with the execution of rent decrees it could have been the intention of the legislature that the Civil Court should in a suit under O. 21, r. 63 have power to set aside the order passed by a Revenue Court on a claim petition. It is however clear that a suit of the kind contemplated by O. 21, r. 63, Civil Procedure Code, cannot be instituted in a Revenue Court because no such suit is referred to in schedule B of the Estates Land Act. Mr. Ramadoss conceded that, though not exactly as a suit under O. 21, r. 63, a suit for similar relief may lie in a Civil Court as one for declaratory relief; but the particular basis on which the suit is to be maintained will have a material bearing upon the question of the period of limitation applicable thereto, namely, whether the one year's rule of limitation is applicable to such suits or not. It will perhaps be more satisfactory if some of these questions are specifically dealt with by the legislature, but as I have already said, it is not necessary for the purpose of the disposal of the appeal to express any final opinion upon them.

Leave refused.

S. V. V. —— *Appeal dismisssd.*

1. (1924) 46 ML..J. 380.
2. (1927) 54 M.L.J. 138: I.L.R. 51 Mad. 774.
3. A.I.R. 1932 Mad. 716.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATARAMANA RAO.

P. P. Koyakutti and others .. *Appellants* (Petitioners 1, 2 and 4 to 6)*

v.

A. Veerankutti .. *Respondent (1st Respondent).*

Koyakutti *v.* Veerankutti.

Limitation Act (IX of 1908), Art. 182 (2)—Mortgage suit—Preliminary decree—Appeal against—Final decree passed pending appeal—Execution petition filed after appellate decree—Appeal in Art. 182 (2)—If means only appeal against final decree or includes appeal against preliminary decree—If original final decree can itself be executed or a fresh decree need be passed.

Where pending an appeal against the preliminary decree in a mortgage suit, which was confirmed on appeal, a final decree was passed, an application for execution of that final decree filed within 3 years of the date of the appellate preliminary decree but more than 3 years after the date of the final decree is in time within Art. 182 (2) of the Limitation Act and not barred. The expression "where there has been an appeal" in Art. 182 (2) means an appeal which is likely to affect the decree sought to be executed.

Narsingh Sewak Singh v. *Madho Das*, (1882) I.L.R. 4 All. 274 and *Somar Singh* v. *Deonandan Prasad Singh*, (1927) I.L.R. 6 Pat. 780, followed.

Fakir Chand Mandal v. *Daiba Charan Parni*, (1927) I.L.R. 54 Cal. 1052 and *Profulla Kumar Basu* v. *Sm. Sorojbala Basu*, (1930) 35 C.W.N. 155, doubted.

Ahammad Kutty v. *Kottekkat Kuttu*, (1932) 64 M.L.J. 251: I.L.R. 56 Mad. 458, dissented from.

It is not necessary to file a fresh application for a final decree or for amendment of the original decree but the original decree itself may be executed. If the decree is being executed, there is nothing to preclude the execution application being amended, as in the case of any decree which is being executed if modified in appeal, by inserting the correct figure as modified in appeal or by the addition of interest at the contract rate up to the date of the appeal. If it is a case of a mere affirmance of the decree, it is also open to the decree-holder to waive the benefit of the interest at the contract rate up to the date of the appeal and he can, if he chooses, have the original decree executed as it stands.

Jowad Hussain v. *Gendan Singh*, (1926) 51 M.L.J. 781: L.R. 53 I.A. 197: I.L.R. 6 Pat. 24 (P.C.) and *Fitzholmes* v. *Bank of Upper India, Ltd.*, (1926) 52 M.L.J. 366: L.R. 54 I.A. 52: I.L.R. 8 Lah. 253 (P.C.), distinguished as cases where there was no final decree passed during the pendency of the appeal against the preliminary decree.

Appeal against the order of the Court of the Subordinate Judge of South Malabar at Calicut dated 9th February, 1933, and made in A. S. No. 205 of 1931 preferred against the order of the Court of the District Munsif of Parpanangadi dated 11th August, 1931, and made in R. E. P. No. 442 of 1930 in O. S. No. 273 of 1924 (A. S. No. 656 of 1925, District Court, A. S. No. 206 of 1926, Sub-Court).

* C.M.S.A. No. 152 of 1933. 26th October, 1936.

Koyakutti *v.* Veerankutti.

K. P. Krishna Menon for Appellants.

K. Kuttikrishna Menon for Respondent.

The Court delivered the following

JUDGMENT.—The main question argued in this appeal is whether an application to execute the final decree in a suit on a mortgage is barred by limitation. The relevant dates necessary for its disposal are as follows:—

Preliminary decree	.. 21st July, 1925.
Final decree	.. 9th November, 1925.
Decree of the appellate Court confirming the preliminary decree	.. 16th March, 1927.
Application for execution	.. 15th March, 1930.

The learned District Munsif held following the decision in *Somar Singh* v. *Deonandan Prasad Singh*[1] that the application was not barred by limitation. But the learned Subordinate Judge following the decision of Madhavan Nair, J., in *Ahammad Kutty* v. *Kottekkat Kuttu*[2] held that it was barred. The Article of the Limitation Act applicable to the case is Art. 182 (2):

" For the execution of the decree of a Civil Court.	Three years.	(where there has been an appeal) the date of the final decree or order of the appellate Court."

The view of Madhavan Nair, J., is that the appeal in column 3 must be from the decree or order sought to be executed, that the appeal from the preliminary decree could not be held to be an appeal from the final decree sought to be executed and when there is no appeal against the final decree, limitation would run from the date of the said decree. The view of the learned Judges of the Patna High Court in *Somar Singh* v. *Deonandan Prasad Singh*[1] which was dissented from by Madhavan Nair, J., is thus expressed by Kulwant Sahay, J., at p. 785:

"There is nothing here to show that the appeal must be against the decree sought to be executed. In my opinion the intention of the Legislature in making the provision was that if an appeal in any way imperils the decree sought to be executed then the date of the final disposal of the appeal should be the date from which the period of limitation ought to be computed."

This view was taken in two early cases decided with reference to Art. 179 (2) of Act XV of 1877 which corresponds to Art. 182 (2) of the present Limitation Act and the language of both the articles is word for word the same. In

1. (1927) I.L.R. 6 Pat. 780.
2. (1932) 64 M.L.J. 251: I.L.R. 56 Mad. 458.

Koyakutti
v.
Veerankutti.

Narsingh Sewak Singh v. *Madho Das*[1], Oldfield and Brodhurst, JJ., observed:

"The article makes limitation run, 'where there has been an appeal,' from 'the date of the final decree or order of the appellate Court', and we think the appeal contemplated is an appeal in the suit, not necessarily an appeal from the original decree in the suit."

In that case, ... a decree was passed on the 23rd August, 1873, but a review of the judgment was admitted and a decree passed on 29th November, 1876, by which the original decree was altered. Then an appeal was preferred by the plaintiff from the decree passed on review, and on a cross-objection taken by the defendant, the decree made on review was set aside by the High Court on the 28th March, 1879. It was held that the time for execution of the original decree ran from the 28th March, 1879, though an appeal therefrom was preferred. So far as I know this decision has never been doubted or dissented from but has since been followed.

In *Lutful Huq* v. *Sumbhudin Pattuck*[2] the facts were as follows: An *ex parte* decree was passed on 7th February, 1876. On the 15th November, 1876, the defendant made an application to revive the suit. The application was rejected on the 15th November, 1876, and an appeal therefrom was dismissed on the 19th November, 1877. It was held that the limitation for the execution of the decree ran from 19th November, 1877, the date of the final order of the High Court. Morris, J., says:

"The application to revive the suit really kept the decree open, and that decree did not become final until the order of the Appellate Court was passed on the 19th December, 1877."

I am aware that the above decision was dissented from in *Fakir Chand Mandal* v. *Daiba Charan Parni*[3] and *Profulla Kumar Basu* v. *Sm. Sorojbala Basu*[4]. But I doubt the correctness of the said decisions and other cases which have taken a similar view as, in my opinion, the decisions in *Narsingh Sewak Singh* v. *Madho Das*[1] and *Lutful Huq* v. *Sumbhudin Pattuck*[2] are consistent with the principle enunciated by the Privy Council in *Nagendra Nath Dey* v. *Suresh Chandra Dey*[5]:

"It is at least an intelligible rule that, so long as there is any question *sub judice* between any of the parties, those affected shall not be compelled

1. (1882) I.L.R. 4 All. 274.
2. (1881) I.L.R. 8 Cal. 248.
3. (1927) I.L.R. 54 Cal. 1052.
4. (1930) 35 C.W.N. 155.
5. (1932) 63 M.L.J. 329: L.R. 59 I.A. 283: I.L.R. 60 Cal. 1 at 7 (P.C.).

Koyakutti *v.* Veerankutti.

to pursue the so often thorny path of execution, which, if the final result is against them, may lead to no advantage".

As already stated by me, the decision in *Narsingh Sewak Singh* v. *Madho Das*[1] has since been followed in *Nagappa Bandappa* v. *Gurushantappa Shankrappa*[2] and the interpretation placed on the article by the former decision that the appeal need not necessarily be from the decree sought to be executed was accepted. (*Vide* Patkar, J., at page 395 and Barlee, J., at page 399.) Madhavan Nair, J., ignores the principle laid down by the Privy Council referred to by me above when he says:

"I am not satisfied there is much substance in the argument that the final decree is imperilled by the decree that may be passed by the appellate Court on the appeal against the preliminary decree".

The view in *Somar Singh* v. *Deonandan Prasad Singh*[3] has since been confirmed by another division Bench of the same High Court in *Somar Singh* v. *Devanandan Prasad*[4] which refused leave to appeal to His Majesty in Council against the said decision, *Somar Singh* v. *Deonandan Prasad Singh*[3]. Dawson Miller, C.J., made the following observations in the course of the judgment with which I agree, namely:—

"It is further well established that the test in such cases is whether the decree of the appellate Court imperils the validity of the decree it is sought to execute. There can be no doubt that the appeal to the High Court from the preliminary decree, had it been successful, would have had the effect of discharging the final decree passed by the trial Court as well as the preliminary decree. It seems to follow, therefore, as a matter of course that the appeal in this case was not only an appeal from the preliminary decree but an appeal from all that naturally followed by the passing of that decree, namely, the final decree for sale which after all is merely part of the machinery prescribed for carrying out the direction for sale contained in the preliminary decree. In these circumstances, it seems to me upon the decided cases and upon the established principles that there is no real substance in the objections taken by the appellant to the decision of this Court".

I may also point out that Rankin, C.J., in *Profulla Kumar Basu* v. *Sm. Sorojbala Basu*[5], observed that he was not prepared to say that the case in *Somar Singh* v. *Deonandan Prasad Singh*[3] was wrongly decided. Even Madhavan Nair, J., says that the wording of cl. 2 of Art. 182 as it stands supports the conclusion arrived at by the learned Judges of the Patna High Court but the context according to him compelled him to take the view he did. I am therefore of opinion that

1. (1882) I.L.R. 4 All. 274.
2. (1932) I.L.R. 57 Bom. 388.
3. (1927) I.L.R. 6 Pat. 780.
4. A.I.R. 1928 Pat. 581.
5. (1930) 35 C.W.N. 155.

Koyakutti v. Veerankutti.

the expression "where there has been an appeal" means an appeal in the suit which is likely to affect the decree sought to be executed. I therefore respectfully dissent from the decision of Madhavan Nair, J., in *Ahammad Kutty* v. *Kottekkat Kuttu*[1] and following the decision in *Somar Singh* v. *Deonandan Prasad Singh*[2] hold that the application is not barred by limitation.

Mr. Kuttikrishna Menon contends that the application for execution of the final decree in this case is not maintainable. His argument is that after the decree of the appellate Court affirming the preliminary decree there must be a fresh final decree and the decree originally passed in pursuance of the preliminary decree of the first Court is not capable of execution. This objection was not taken in the Courts below and must be deemed to have been abandoned. If the said objection has been taken, it would have been open to the learned District Munsiff to treat the application for execution as an application for a final decree and pass a final decree if it was necessary. (Vide *Appa Rao* v. *Krishna Aiyangar*[3] and *Narasimha Rao* v. *Gangaram*[4].) Were it necessary to decide this question, I am of opinion that a fresh application for a final decree or amendment of the original decree is not necessary. In support of his contention Mr. Kuttikrishna Menon relied on the recent decision of Pandalai, J., in *Ramaswami Aiyar* v. *Pakkiri Pathar*[5] and the decisions of the Privy Council in *Jowad Hussain* v. *Gendan Singh*[6] and *Fitzholmes* v. *Bank of Upper India, Ltd.*[7]. If the decisions are closely examined they do not support his contention. But before doing so, let me refer to the relevant provisions of the Civil Procedure Code in force at the material dates when the various decrees were passed in the case. Under O. 34, r. 4 in a suit for sale, the Court shall pass a preliminary decree ordering an account of the amount due to the mortgagee for principal and interest and for his costs of the suit or declaring the amount so due and directing that if the defendant pays into Court the amount so due on a date within six months from the date of declaring the amount

---

1. (1932) 64 M.L.J. 251 : I.L.R. 56 Mad. 458.
2. (1927) I.L.R. 6 Pat. 780.
3. (1901) I.L.R. 25 Mad. 537.
4. (1908) 18 M.L.J. 590 : I.L.R. 31 M. 431.
5. (1933) 66 M.L.J. 24 : 38 L.W. 946.
6. (1926) 51 M.L.J. 781 : L.R. 53 I.A. 197 : I.L.R. 6 Pat. 24 (P.C.).
7. (1926) 52 M.L.J. 366 : L.R. 54 I.A. 52 : I.L.R. 8 Lah. 253 (P.C.).

Koyakutti *v.* Veerankutti.

so due to be fixed by the Court the plaintiff shall deliver up to the defendant all title deeds relating to the property and if so required re-transfer the property and if such payment is not made the mortgaged property be sold. Under r. 5 the Court is bound to pass a final decree either at the instance of the mortgagor or at the instance of the mortgagee when the mortgagor on or before the date fixed either pays the money into Court or commits default. In case the mortgagor pays the money into Court the decree will be directing the mortgagee to deliver possession of the documents of title relating to the mortgaged property and if so required to re-transfer the mortgaged property to the mortgagor or put the mortgagor in possession thereof. If default is committed in payment, the Court is bound to pass a final decree directing the mortgaged property or sufficient portion thereof to be sold. A decree so passed is valid and operative and remains in full force till it is modified or reversed in appeal. Pendency of an appeal from the preliminary decree does not operate as a stay of further proceedings in the suit or the passing of the final decree or the execution thereof unless there has been a stay by the appellate Court. This is the view taken by a Bench of the Allahabad High Court in *Khair-un-nissa Bibi* v. *Oudh Commercial Bank, Ltd.*[1] and it has since been affirmed by a Full Bench of the Allahabad High Court in *Sat Prakash* v. *Bahal Rai*[2]. In both the cases the conclusion was reached after an elaborate examination of the provisions of the Code and the relevant decisions including those of the Privy Council. The same view was taken by the learned Judges of the Patna High Court in *Iswari Prasad Singh* v. *Raghubans Lal*[3]. The preliminary decree may be reversed in appeal in which case the final decree goes with it. It may be modified or confirmed. In either case if the final decree already obtained has not been executed the decree-holder can have the decree amended by inserting the correct figure as modified in appeal or by the addition of interest at the contract rate up to the date of the appeal or the decree-holder can apply for a fresh final decree. This is the course pointed out by Pandalai, J., in *S. P. S. R. Subramania Ayyar* v. *Oomer Cotty Haji*[4]. If the decree is being executed

1. (1929) I.L.R. 51 All. 640. 2. (1930) I.L.R. 53 All. 283 (F.B.).
3. (1934) I.L.R. 13 Pat. 379.
4. (1933) 38 L.W. 933.

Koyakutti v. Veerankutti.

there is in my opinion nothing to preclude the execution application being amended as in the case of any decree which is being executed if modified in appeal. If it is a case of a mere affirmance of the decree it is open to the decree-holder to waive the benefit of the interest at the contract rate up to the date of the appeal and he can, if he chooses, have the original decree executed as it stands. There is nothing in law to prevent him from doing so and it is not possible to understand how a decree which was valid and operative ceases to be so by the mere fact that the preliminary decree on which the final decree was passed was confirmed in appeal. In *Khair-un-nissa Bibi* v. *Oudh Commercial Bank, Ltd.*[1], the final decree in a suit on a mortgage passed during the pendency of an appeal from the preliminary decree which was eventually affirmed by the Court of appeal was held to be valid and binding on the parties and capable of execution. It seems to me that this is the correct view to take under the law as it stands. There is nothing in the decisions of the Privy Council against this view. Both in *Jowad Hussain* v. *Gendan Singh*[2] and *Fitzholmes* v. *Bank of Upper India, Ltd.*[3], there was no final decree passed during the pendency of the appeal against the preliminary decree. Mr. Kutti Krishna Menon relied very strongly on the observations of Banerjee, J., in *Gajadhar Singh* v. *Kishan Jiwan Lal*[4] which were approved by the Privy Council in *Jowad Hussain* v. *Gendan Singh*[2]. The observations are to the effect that the rule "contemplates the passing of only one final decree in a suit for sale upon a mortgage". Both in *Jowad Hussain* v. *Gendan Singh*[2] and *Fitzholmes* v. *Bank of Upper India, Ltd.*[3], the question that was considered was one of limitation for an application for a final decree. Their Lordships observed that the limitation ran only from the date of the preliminary decree which was confirmed on appeal and which was the only decree in the cause on which the final decree could be passed. Their Lordships were not dealing with the question as to what should happen if a final decree as required by the Code was passed during the pendency of the appeal. In *Gajadhar Singh* v. *Kishan Jiwan Lal*[4] also there was no final decree passed during the pendency of an appeal against the preliminary decree and

1. (1929) I.L.R. 51 All. 640.
2. (1926) 51 M.L.J. 781 : L.R. 53 I.A. 197 : I.L.R. 6 Pat. 24 (P.C.).
3. (1926) 52 M.L.J. 366 : L.R. 54 I.A. 52 : I.L.R. 8 Lah. 253 (P.C.).
4. (1917) I.L.R. 39 All. 641.

Koyakutti v. Veerankutti.

the observations of Banerji, J., therein were explained by the Full Bench of the Allahabad High Court in *Sat Prakash* v. *Bahal Rai*[1] thus:

"We are of opinion that the expression 'it is impossible to hold that there can be more final decrees than one in a suit for sale upon a mortgage' must mean that on the date when Gajadhar Singh presented his application praying for the final decree to be passed, there could not be more than one final decree, and as the preliminary decree of the trial Court was superseded by the decree passed in appeal, the trial Court could not possibly have made final the original preliminary decree which has ceased to exist".

No authority has been cited before me to show that it is obligatory to apply for a fresh final decree. I am therefore of the opinion that it was competent to the plaintiffs to execute the final decree obtained by them as it stood.

In the result, I allow the appeal with costs.

Leave granted.

S.V.V. — *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VARADACHARIAR AND MR. JUSTICE MOCKETT.

Addepalli Lakshmanaswamy .. *Appellant** (*Defendant*)

v.

Gadireddi Narasimha Rao .. *Respondent* (*Plaintiff*).

Lakshmanaswamy v. Narasimha Rao.

Promissory note—Plea of nominal transaction—Allegation of—Illegality vitiating the note—Note alleged to have been executed in pursuance of an attempt to stifle prosecution—Not in fact found—The Court must be satisfied as to the vitiating circumstances—Onus on the defendant alleging it.

The defence to a claim on a promissory note was that the note had been executed nominally as it was so connected with certain transactions between the promisee and another person that the defendant should be held to have incurred no liability whatever except to see that the third person paid up his dues to the promisee or that the transaction was illegal as being the result of an agreement to stifle a proposed criminal prosecution by the promisee against the third person. The plaintiff wanted to avoid an investigation of some of these questions on the ground that he was a *bona fide* holder in due course having obtained an endorsement of the promissory note from the promisee firm for consideration and without notice of any vitiating circumstances.

The lower Court found that the execution of the suit note could not be said to be vitiated on the ground of illegality of consideration.

Held, (1) that the authorities showed that the mere possibility of a talk of criminal proceedings at some stage or another would not make the transaction illegal; the Court should be satisfied that the note was given in pursuance of an agreement to stifle a prosecution;

---

1. (1930) I.L.R. 53 All. 283 at 288.

* Appeal No. 178 of 1934. 29th July, 1936.

(2) that as the defendant admitted the execution of the note, the onus *prima facie* lay upon him to prove absence of consideration or other circumstances exonerating him from liability; and

(3) that as that onus was not discharged, the plaintiff was entitled to a decree on the suit promissory note in the terms given by him.

Appeal against the decree of the District Court of East Godavari at Rajahmundry in O. S. No. 30 of 1933.

V. S. Narasimhachar for Appellant.

G. Lakshmanna and *G. Chandrasekhara Sastri* for Respondent.

The judgment of the Court was delivered by

Varada-chariar, J.

Varadachariar, J.—This is an appeal by the defendant against a decree on a promissory note (Ex. A) admittedly executed by him in favour of a Marwari firm of Rajahmundry for Rs. 3,250. The defence on the merits is framed in very general terms in issue No. 1, *viz.*, "was the pro-note executed under the circumstances mentioned in the written statement and is it void?" The question has been argued before us under various aspects. One of the pleas put forward by the defendant was that the pro-note was executed nominally. The learned Judge rightly observes that on the defendant's own showing it is difficult to understand this plea. The substance of the defence, however, is that the execution of this note is so connected with certain transactions between that Marwari firm and one G. Krishnamurthi, a merchant of Rajahmundry, that the defendant should be held to have incurred no liability whatever except to see that Krishnamurthi paid up his dues to the Marwari firm or that the transaction was illegal as being the result of an agreement to stifle a proposed criminal prosecution by the Marwari firm against Krishnamurthi. The plaintiff apparently wanted to avoid an investigation of some of these questions on the ground that he was a *bona fide* holder in due course having obtained an endorsement of the promissory note from the Marwari firm for consideration and without notice of any vitiating facts. The learned Subordinate Judge has rightly held that the plaintiff has not made out this ground of claim. There is sufficient justification for the learned Judge's opinion that it is the Marwari firm that is conducting the suit through the plaintiff and that the plaintiff must have been aware of the circumstances under which the promissory note came to be executed.

In dealing with what we have stated above to be the main defence in the case, it is necessary to examine what exactly

Lakshmanaswamy v. Narasimha Rao.

Varadachariar, J.

happened on or about the date of the suit pro-note, *i.e.*, 26th September, 1930. Krishnamurthi had borrowed moneys from the Marwari firm on the security of the stock of Aluminium circles stored in rooms in Krishnamurthi's house, the key of the rooms being in the possession of the Marwari firm. It was the practice for Krishnamurthy to remove from those rooms, with the consent of the Marwari firm, so much of the stock as he wished to utilise for his own purpose, on payment of a proportionate part of the debt calculated on the footing that 500 pound circles could be released on payment of Rs. 325. The books of the Marwari firm as well as Krishnamurthi's books show that on or about 26th September, 1930, the firm has credited Krishnamurthi with a sum of Rs. 3,276 out of which, deducting a sundry item of Rs. 26 separately entered, the sum of Rs. 3,250 is separately entered in Krishnamurthi's books as having come to him from the defendant, and paid over by him to the Marwari firm. Krishnamurthi's book also shows this transaction under a column provided for adjustment entries as distinct from another column dealing with cash transactions. It is the defendant's case that on the 25th when the stock in the rooms was weighed it was found to be short by about 5,000 circles, that the Marwari firm through P. W. 1 threatened a prosecution against Krishnamurthi and that as part of an arrangement for the abandonment of the contemplated prosecution it was suggested to him by the Marwari himself that he might execute a promissory note for a sum of Rs. 3,250, because the Marwari was not prepared to accept the suggestion made by the defendant that a pro-note for that amount might be taken from Krishnamurthi himself. The defendant would add that he was assured even at that time that this was merely done to bring a kind of pressure on Krishnamurthi to satisfy the debt in the ordinary course and the pro-note was not intended to be enforced against himself. P.W. 1 attempts to dissociate the suit transaction from the transactions between the Marwari firm and Krishnamurthi. We are not satisfied that either party has stated the whole truth. After a careful examination of the evidence, we are of opinion that the learned Subordinate Judge has come to a correct conclusion on the facts in summarising the result of the evidence as follows:

"There can be no doubt that the Marwari took the pro-note as representing the loss sustained by him on the 5,000 and odd pounds of aluminium circles that were found missing on the 25th September, 1930".

Lakshmanaswamy
v.
Narasimha Rao.
——
Varadachariar, J.

The learned Judge rejected the story that there was any agreement to stifle a prosecution; his view was that the Marwari probably threatened to make a report to the Police because he would naturally have been anxious to trace the aluminium circles which were found short on weighment. There was no doubt some basis for a suspicion that that portion of the stock could not have disappeared without Krishnamurthi's knowledge but on the other hand the evidence itself shows that Krishnamurthi turned round against the Marwari because the keys of the rooms in which the stock had been stored were in the possession of the Marwari.

The idea of a prosecution of Krishnamurthi seems to us an invention. What is most likely to have happened is that as the parties were not able to agree as to how the goods could have disappeared they were anxious to investigate the loss. Whether Krishnamurthi in his own mind was conscious of any worse conduct on his part is not a material point for the decision of this case. If the Marwari did not proceed further with the contemplated complaint, it is difficult in the circumstances to draw from it the inference that there was an agreement to stifle a prosecution. It is not as if the evidence clearly establishes conduct on Krishnamurthi's part which would have justified a prosecution or even led the Marwari to think that there was a reasonable chance of success in launching such a prosecution. This being the true position at the time when the promissory note was executed, we see no reason to differ from the view of the lower Court that the execution of the promissory note could not be said to be vitiated on the ground of illegality of consideration.

The authorities show that the mere possibility or a talk of criminal proceedings at some stage or another will not make the transaction illegal. The Court must be satisfied that the pronote was given in pursuance of an agreement to stifle a prosecution. It was pointed out as early as in *Ward* v. *Lloyd*[1] that the mere fact that the plaintiff did not prosecute the defendant as at one time he threatened will not warrant the Court in coming to the conclusion that there was an agreement on his part to abstain from prosecuting. If the fact of the actual commission of the offence is beyond doubt and the plaintiff knew of it his abstaining from prosecuting would afford

1. (1844) 7 Scott's N.R. 499 at 506.

Lakshmanaswamy v. Narasimha Rao.

Varadachariar, J.

some foundation for the argument that the non-prosecution must have been the result of an agreement not to prosecute. But as stated already there is very little basis in this case for finding that the Marwari could have ever seriously thought that Krishnamurthi had committed any offence. Further, this is certainly not the case of a person who wishes to gain some money not already due to him, as a result of some arrangement entered into on the threat of criminal proceedings; P.W. 1 has only taken steps to secure payment to himself of a portion of the money undoubtedly due to him from Krishnamurthi and in respect of which the security had admittedly become insufficient when on weighment on 25th September, 1930, it was found that the stock was less than it should be.

Mr. Narasimhachariar, the learned counsel for the appellant, recognised the distinction between cases in which there is a pre-existing civil liability and those in which there is no such pre-existing liability, but he pointed out, that in many cases where this distinction is recognised the pre-existing liability is that of the very person who gave a subsequent note or security and the security or note is not given by a stranger. In that connection he relied on the observations of Cotton, L.J., in *Flower* v. *Sadler*[1]. But this circumstance is only a factor to be borne in mind in drawing the inference of fact as to whether the promissory note was given in pursuance of an agreement to stifle a prosecution. It is not a principle of *law* that wherever a third person undertakes the liability of another in circumstances similar to those in the present case, the third person's promise is either without consideration or vitiated by illegality. In *Dwijendra Nath Mullick* v. *Gopiram Gobindaram*[2], *Sukhdeo Dass* v. *Mangal Chand*[3] and *Adhikanda Sahu* v. *Jogi Sahu*[4] we find that third persons had undertaken the liability either individually or jointly with the person originally liable, in circumstances similar to those in the present case; and in all of them the learned Judges held that the transaction was not vitiated on the ground of illegality. It may be that if Krishnamurthi's liability still continued or if the present defendant was such a stranger to Krishnamurthi in respect of their pecuniary transactions that the defendant could be held to have intervened in this matter only with a view to save

1. (1882) 10 Q.B.D. 572 at 576.
2. (1925) I.L.R. 53 Cal. 51.
3. (1917) 41 I.C. 812.
4. (1921) 70 I.C. 295.

Lakshmanaswamy v. Narasimha Rao.

Varadachariar, J.

Krishnamurthi from prosecution, the inference of an agreement to stifle a prosecution would easily follow; but the evidence establishes that the defendant and Krishnamurthi were interested in each other's business and the defendant had advanced large amounts to Krishnamurthi. There is even a suggestion in the defendant's cross-examination that he was a partner in this very Aluminium business of Krishnamurthi but that is nothing more than a suggestion. Anyhow, the defendant's admissions themselves are sufficient to show that it was not merely as a friend that he was interested in Krishnamurthi's affairs. What is more significant in this case is that on the date of Ex. A not merely had the Marwari firm treated Krishnamurthi's liability to them as reduced by this sum of Rs. 3,250 but there are corresponding entries in Krishnamurthi's books crediting the defendant with that sum and also crediting the Marwari with that sum. The subsequent settlement of accounts between Krishnamurthi and that Marwari firm has also proceeded on the footing that Krishnamurthi's liability to the firm had already been reduced by this sum of Rs. 3,250. It is thus clear that there was a perfectly intelligible reason for the Marwari and Krishnamurthi and the defendant entering into this transaction, *viz.*, that to avoid all questions as to how the stock came to be reduced they arranged that it might be treated as a redemption of so much of the stock by Krishnamurthi on the usual terms, of payment of Rs. 325 for every 500 circles removed and the defendant was willing to find the money or undertake the liability to enable Krishnamurthi to do so. In this view there is no basis either for the suggestion that there could have been no consideration for Ex. A or that the agreement could only have been to stifle a criminal prosecution.

It was next argued by Mr. Narasimhachar that as the plaintiff came into Court with a case that consideration for Ex. A passed in the form of a cash payment and that it had nothing to do with the transactions between Krishnamurthi and the Marwari firm, we should dismiss the suit when we hold that that case had not been made out. In support of this argument, he relied on the observations of Sundara Aiyar, J., in *Raghavalu Chetti* v. *Sabapathy Chetti*[1] and the observations of a learned Judge of the Allahabad High Court in *Ram Jash* v.

1. (1911) 21 M.L.J. 1013.

Lakshmanaswamy v. Narasimha Rao.

Varadachariar, J.

Markande Pathak[1]. We do not think that on a question of this kind it is possible or desirable to lay down any hard and fast rule. It is true that the decision of the Court must be based upon the evidence in the case and not upon any speculation as to the possibility of a case not found in the evidence. In the present case, as the defendant admitted the execution of the suit promissory note, the onus *prima facie* lies upon him to prove absence of consideration or other circumstances exonerating him from liability. We have held that he has not succeeded in proving either absence of consideration or illegality of consideration. If the matter stood there, undoubtedly the plaintiff's suit must have succeeded. Where a plaintiff who also leads evidence fails on the story that the consideration was paid in a particular form, it may sometimes happen that the Court may be unable to come to any conclusion as to what the consideration was. But in the present case, as we have already explained, that is not the position to which the Court is driven. Krishnamurthi's books have been exhibited as evidence on the defendant's side. They undoubtedly show the true nature of the transaction and when the evidence is examined in the light of those books it is sufficient to establish that the defendant's story is false in so far as he brings in an element of illegality into the transaction and also in so far as he pleads that there was an understanding that Krishnamurthi alone should be held liable for the whole amount of his debt to the Marwari firm and that the defendant should not be liable to the Marwari firm even to the extent of the amount taken over under Ex. A. If in these circumstances the Court holds that the suit transaction is supported by consideration, we do not think this can be said to be a case in which the Court will be giving the plaintiff a decree on mere speculation. If portions of the plaintiff's case are false, that will be a matter to be taken into account in dealing with the question of costs. We do not think that any principle of law requires us to hold that the suit should necessarily be dismissed in such circumstances. If the defendant could plead that he had been taken by surprise on any particular point that would be another matter. But that is not the position here. We therefore agree with the learned Judge that the plaintiff was entitled to a decree on the suit promissory note in the terms given by him.

---

1. A.I.R. 1934 All. 1068.

Lakshmanaswamy v. Narasimha Rao.

Varadachariar, J.

It was next contended on the authority of the cases in *Nanak Ram* v. *Mehin Lal*[1] and *Sesha Aiyar* v. *Mangal Doss Jee*[2] that the suit note should be held to be one not supported by consideration. But the facts here are different. In *Sesha Aiyar* v. *Mangal Doss Jee*[2] the learned Judges were dealing with the matter merely on the pleadings, before any evidence had been recorded and they only observe that there was no admission in the written statement that the promisee *at the request of the promisor* put himself to any loss. But here we have already pointed out that as the result of Ex. A the Marwari firm released Krishnamurthi *pro tanto* from his liability to the firm and except for the plea of illegality it cannot be said that it was not done at the defendant's instance and as a result of the promissory note. The case in *Nanak Ram* v. *Mehin Lal*[1] proceeded on a very different set of facts and it is not necessary to refer to them here in detail.

It was lastly suggested that just as Krishnamurthi made some payments which have been endorsed on the suit note, Krishnamurthi has settled the whole account including the suit debt with the Marwari firm and that therefore there is no liability any longer outstanding under Ex. A. The endorsements on Ex. H however clearly establish that Krishnamurthi discharged the Marwari's debt only after excluding the amount due under Ex. A.

The respondent has filed a memorandum of objections objecting to the order of the lower Court in respect of costs. The learned Subordinate Judge took the view that as the plaintiff as P. W. 1 persisted in putting forward the case that Ex. A represented a cash transaction independent of the dealings between Krishnamurthi and the Marwari firm, the case is one in which the Court should exercise its discretion as to costs against the plaintiff, not only to the extent of depriving the plaintiff of his costs but even of directing the plaintiff to pay the defendant's costs. This seems to us wholly unwarranted. In certain cases the Court might refuse to award costs even to a successful plaintiff, if he had been guilty of improper conduct in connection with the institution or trial of the case; but there is little or no precedent for directing a successful plaintiff to pay the defendant's costs, when the learned Judge has himself

---

1. (1877) I.L.R. 1 All. 487. 2. (1909) 20 M.L.J. 144.

Lakshmanaswamy v. Narasimha Rao.

Varadachariar, J.

held that the conduct of the defendant in putting forward his pleas or in conducting his case has been no better than that of the plaintiff. We were at one stage disposed to think that we might be doing justice between the parties by directing them to bear their respective costs in the lower Court but Mr. Lakshmanna, the learned counsel for the respondent, rightly insisted that the defendant's reply notice left the plaintiff no alternative but to institute the suit because the defendant wholly declined to pay any portion of the suit claim. In these circumstances, we think the proper order as to costs in the lower Court will be that the defendant should pay to the plaintiff the institution fee, namely, Rs. 322-7-0 but that in other respects the plaintiff and the defendant should bear their respective costs in the lower Court. In the result, the appeal is dismissed with costs and the memorandum of objections is allowed to the extent above indicated. There will ne no order as to costs in the memorandum of objections.

K.C. —— *Appeal dismissed and Memo. of objections allowed in part.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATASUBBA RAO AND MR. JUSTICE CORNISH.

Sellappa Chettiar and others .. *Appellants** (*Defendants*)

v.

Suppan Chettiar and others .. *Respondents* (*Plaintiff and Defendants 1 and 2*).

Sellappa Chettiar v. Suppan Chettiar.

Impartible estate—Debts incurred by the holder—Mortgage of properties by holder and his son—How far binding on the estate—Purchase of a house whether conferring a "benefit" on the estate—Right of junior members, whether a mere "spes successionis"*—Impartible Estates Act* (*Madras Act II of 1904*).

Where a holder of an impartible estate (now deceased) and his son (defendant 1) mortgaged some of their impartible properties to secure a debt of Rs. 8,300 consisting of two parts (1) Rs. 4,892 borrowed for the purpose of redeeming from an earlier mortgage a house purchased, and (2) Rs. 3,408 borrowed for meeting the expenses of the marriage of the late Zamindar's daughter, and the question arose how far the above debts could bind the impartible estate.

Held, that if the original purchase of the house could be justified, it would follow that that part of the debt should be held binding. Naturally it led to the question, what was the extent of a manager's power in regard to buying a

* Appeal Suit No. 418 of 1931. 12th November, 1936.

Sellappa Chettiar v. Suppan Chettiar.

property. To hold that the rule of benefit should be confined only to cases where both need and benefit co-existed would be to disregard 'benefit' as affording a distinct ground of justification. The transaction need not be of a 'defensive nature'. The pronouncements of the Judicial Committee would not justify the narrower view being taken of the expression 'for the benefit of the estate'.

Jagat Narain v. *Mathura Das*, (1928) I.L.R. 50 All. 969 (F.B.), followed.

Hunoomanpersaud v. *Mussumat Babooee*, (1856) 6 M.I.A. 393 and *Palaniappa* v. *Deivasikamony*, (1917) 33 M.L.J. 1: L.R. 44 I.A. 147: I.L.R. 40 Mad. 709 (P.C.), discussed and explained.

(2) In order to prove that the purchase of the house could be said to have conferred a benefit upon the estate in the sense interpreted above, it was not sufficient to show that the house was used for residential purposes. It ought to be shown that the house formed an accretion to the impartible estate. The mere fact that the money borrowed represented a portion of the proceeds of the sale of a fraction of the impartible estate raised no presumption of an intention to incorporate. Therefore it should be held that the mortgage to the extent of Rs. 4,892 was not for a purpose binding upon the estate. The transaction would affect, however, the Zamindar's life interest. But as he had died before the action, the plaintiff could derive no benefit from the alienation made by the previous holder.

(3) That *Ramasami Naik* v. *Ramasami Chetty*, (1907) 17 M.L.J. 201: I.L.R. 30 Mad. 255, which held the interest of the coparceners to be a mere *spes successionis* could no longer be regarded as the correct law in view of the pronouncements of the Judicial Committee in *Shiba Prasad Singh* v. *Prayag Kumari Debi*, (1932) 63 M.L.J. 196: L.R. 59 I.A. 331: I.L.R. 59 Cal. 1399 (P.C.); *Sri Raja Ramakrishna Rao* v. *Court of Wards*, (1899) 9 M.L.J. Sup. 1: L.R. 26 I.A. 83: I.L.R. 22 Mad. 383 (P.C.); *Baijnàth Prasad Singh* v. *Tej Bali Singh*, (1920) 40 M.L.J. 387: L.R. 48 I.A. 195: I.L.R. 43 All. 228 (P.C.); *Chowdhury Chintamun Singh* v. *Nowlukho Konwari*, (1875) L.R. 2 I.A. 263: I.L.R. 1 Cal. 153 (P.C.) and *Collector of Gorakhpur* v. *Ram Sundar Mal*, (1934) 67 M.L.J. 274: L.R. 61 I.A. 286: I.L.R. 56 All. 468 (P.C.).

(4) That under the Impartible Estates Act no member could make any alienation which would enure beyond his own life time. Therefore no difficulty there would be in holding that the mortgage in question, to the extent of the first item of the consideration, affected the life interest of the first defendant by reason of his having joined in the transaction of his father, the last holder of the impartible estate.

(5) The other amount of Rs. 3,408 was a debt borrowed for a legal necessity in so far as the evidence that the amount had been utilised in meeting the expenses of the marriage of the late Zamindar's daughter was not contradicted. Therefore to that extent what passed to the mortgagee was the entire estate in the properties and not merely life interests of the two executants.

Appeal against the decree of the District Court of West Tanjore at Tanjore in O.S. No. 16 of 1928.

T. L. Venkatarama Aiyar for Appellants.

B. Sitarama Rao and *S.R. Muthuswami Aiyar* for Respondents.

Sellappa Chettiar v. Suppan Chettiar.

Venkatasubba Rao, J.

The judgment of the Court was delivered by

Venkatasubba Rao, J.—This suit has been brought to enforce a simple mortgage granted to the plaintiff on 8th January, 1916 (Ex. A) by the first defendant and his father, the late Zamindar of Neduvasal to secure the re-payment of Rs. 8,300. It may be mentioned that the plaintiff was a usufructuary mortgagee under two earlier deeds executed in his favour on 16th December, 1910, for about Rs. 86,000. The suit mortgage comprises six villages, of which four have been subsequently sold by the first defendant and his father to the second defendant by Ex. F dated 14th August, 1919. The latter by Ex. H dated the 1st June, 1925, conveyed his interest to defendants 3 to 5 reciting in the deed that the original purchase was intended to be on their behalf.

The only persons contesting the suit are defendants 3 to 5. The first defendant, it may however be stated, originally filed a defence, but subsequently not only withdrew it but admitted the plaintiff's claim.

The villages in question are part of an impartible estate, of which the first defendant's father was the proprietor at the time the suit mortgage was granted. Defendants 3 to 5 contend that the alienation was made without legal necessity and is consequently not binding on the estate under S. 4 of the Impartible Estates Act (Madras Act II of 1904). The effect of that section is that the power of the proprietor in regard to alienating his estate or binding it by his debts, is co-extensive with that of a manager of a joint Hindu family, not being a father or grandfather; in other words, the Act does not recognise the doctrine either of antecedent debt or of pious obligation. (See *Venkatalingama Nayanim Bahadur* v. *Arunachellam Chettiar*[1].) The short question therefore is, was the alienation made for a purpose which would have been held justifiable, had it been made by a manager of coparcenery property? Before dealing with the question, we may observe (and it is conceded), that it is unnecessary to enquire in this suit, what interest, if any, defendants 3 to 5 have acquired in the suit property by reason of the alienations mentioned above (Exs. F and H).

1. (1924) 19 L. W. 132.

Sellappa Chettiar v. Suppan Chettiar.

Venkatasubba Rao, J.

The mortgage amount of Rs. 8,300 consists of two parts:

(1) Rs. 4,892 borrowed for the purpose of redeeming from mortgage a property at Tanjore known as "Kamala Vilas".

(2) Rs. 3,408 borrowed for meeting the expenses of the marriage of the late Zamindar's daughter, *i.e.*, the first defendant's sister. In regard to the former amount, the facts are these. The late Zamindar purchased a house known as 'Kamala Vilas' on the 26th June, 1915, for Rs. 6,500. The house had been previously mortgaged and the Zamindar undertook to discharge the mortgage debt. This amounted to Rs.4,892, which sum was paid from the amount borrowed from the plaintiff. If the original purchase of the house can be justified, it follows that this part of the debt must be held to be binding. This raises the question, what is the extent of a manager's power in regard to buying property? It is not doubted that the power of the manager can be exercised not only in a case of need but also "for the benefit of the estate". This has been held in numerous cases which have followed *Hunoomanpersaud* v. *Mussumat Babooee*[1] but as regards what is meant by the expression 'the benefit of the estate,' there has been a conflict of judicial opinion. One view seems to be, that unless the transaction is of a defensive character, in the sense that it is calculated to protect the estate from some threatened danger or destruction, it cannot be said to be for the benefit of the estate. We are unable to place this narrow interpretation upon the words in question. If the true doctrine is that the "defensive character" is to be the test, the distinction between necessity and benefit disappears. For, suppose an alienation is made for raising funds to preserve some part of the estate from extinction, it is difficult to say in this instance whether the purpose is one of need or one of benefit, but there can be no doubt that the primary purpose is one of need. Suppose, again, money is raised for defending the estate from hostile litigation. Here again, the question whether the purpose is one of necessity or benefit presents similar difficulty. The fact is that benefit and need are so intervoven in such cases as to make the demarcation difficult. To hold therefore that the rule of benefit should be confined only to cases where both need and benefit co-exist, would be to disregard 'benefit' as

1. (1856) 6 M.I.A. 393.

Sellappa Chettiar v. Suppan Chettiar.

Venkatasubba Rao, J.

affording a distinct ground of justification. In *Hunoomanpersaud* v. *Mussumat Babooee*[1] the rule is stated with sufficient emphasis upon benefit as furnishing a further ground. Their Lordships say:

"It (the power) can only be exercised rightly in a case of need, or for the benefit of the estate. But where in the particular instance, the charge is one which a prudent owner would make in order to benefit the estate, the *bona fide* lender is not affected by the precedent mismanagement of the estate".

In this passage the reference to 'prudent owner' when considering the question of benefit, is not without significance. That seems to show that their Lordships are thinking of 'benefit' as something distinct from 'need'. Their Lordships then go on to say:

"The actual pressure on the estate, the danger to be averted or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded".

This seems to have given rise to the view that the 'pressure' and the 'danger' referred to here are examples of the 'benefit' mentioned. In *Palaniappa* v. *Deivasikamony*[2], their Lordships of the Judicial Committee point out the difficulty of stating precisely what is meant by 'benefit' used in this connection. The whole passage is worth quoting:

"No indication is to be found in any of them as to what is, in this connection, the precise nature of the things to be included under the description 'benefit to the estate'. It is impossible, their Lordships think, to give a precise definition of it applicable to all cases, and they do not attempt to do so. The preservation, however, of the estate from extinction, the defence against hostile litigation affecting it, the production of it or portions from injury or deterioration by inundation, these and such like things would obviously be benefits. The difficulty is to draw the line as to what are, in this connection, to be taken as benefits and what not".

Their Lordships recognise the difficulty (we may add, possibly also the danger) or attempting a precise statement of what are included in the term 'benefit'. To infer from the three instances given in the passage that the transaction should be of a defensive nature, does not seem warranted by the language used. These three instances are given as cases of obvious benefit, which seems necessarily to imply, far from suggesting the contrary, that cases of less obvious benefit are not to be excluded. Indeed, it could be easily conceived what strange anomalies would arise were the restricted view to prevail. To

---

1. (1856) M.I.A. 393.
2. (1917) 33 M.L.J. 1: L.R. 44 I.A. 147: I.L.R. 40 Mad. 709 (P.C.).

Sellappa Chettiar v. Suppan Chettiar.

Venkatasubba Rao, J.

take a familiar example, where unproductive immovable property is sold with a view to the investment of the proceeds in the purchase of more suitable property, we fail to see why the sale should be condemned as not being for a justifiable purpose. Other similar cases may be supposed, in which it would be in the interests of the coparcenery to sell ancestral property with a view to make a fresh purchase. Is it to be held that a manager cannot sell the family dwelling house situated in a slum, in order to buy a fresh property intended for the future residence of the family? Again, is a manager to be debarred from selling the dwelling house in a remote village, when the family for educating its children shifts its residence to a town? Or again, is it proper to hold that a manager can repair a dilapidated family house, but cannot incur a debt for the purpose of reasonably improving and enlarging it? The Full Bench of the Allahabad High Court, in a forcible and lucid judgment, repelled the theory that the transaction must necessarily be of a "defensive nature" (*Jagat Narain* v. *Mathura Das*[1]) and we agree with the opinion expressed there that the pronouncements of the Judicial Committee would not justify the narrower view being taken of the expression 'for the benefit of the estate'.

The question then remains, whether the evidence adduced here is sufficient to prove that the purchase of the house could be said to have conferred a benefit upon the estate in the sense we have interpreted it. There was no attempt made to show in what circumstances or for what purpose the house was purchased. Mr. Sitarama Rao for the plaintiff relies upon the recital in Ex. F to the effect that on its date, namely, in 1919, the Zamindar and his family were actually residing in that house. Granting the recital to be evidence, it merely shows that the house was used for residential purposes, but that is hardly sufficient. Moreover, it ought to be shown that the house formed an accretion to the impartible estate, for, if there was no intention to incorporate it, the purpose could hardly be described as justifiable. In Ex. F it is stated that for the repair of this house, a part of the amount raised under that document was utilised. The mere fact that the money represents a portion of the proceeds of the sale of a fraction of the impartible estate raises no presumption of an intention

1. (1928) I.L.R. 50 All. 969 (F.B.).

Sellappa Chettiar v. Suppan Chettiar.

Venkatasubba Rao, J.

to incorporate; beyond that, no evidence whatsoever has been adduced. We must therefore hold that the mortgage to the extent of Rs. 4,892 was not for a purpose binding upon the estate. The transaction would, however, affect the Zamindar's life interest; but as he had died before the action, the plaintiff could derive no benefit from the alienation made by the previous holder.

This leads us to the question whether the Zamindar's son, *i.e.*, the present first defendant by joining in the mortgage conveyed any interest to the plaintiff. Mr. T. L. Venkatarama Aiyar strongly contends, relying upon some cases of which *Ramasami Naik* v. *Ramasami Chetti*[1] is the most important, that in the case of an impartible joint family estate, the coparceners other that the Zamindar in possession have no right of ownership. This question has been fully considered in two recent decisions of the Judicial Committee and their Lordships have with great emphasis repelled the contention that there was no co-ownership. In *Shiba Prasad Singh* v. *Prayag Kumari Dcbi*[2] their Lordships, in the judgment delivered by Sir Dinshaw Mulla, review the case-law on the point and show that the decisions proceed upon two apparently inconsistent views; one set of decisions (*Sartaj Kuari* v. *Deoraj Kuari*[3], the *first Pittapur case*[4] and the *second Pittapur case*[5]), proceed on the view that there is no co-ownership, while the other line represented by *Baijnath's case*[6], rests upon the principle that there is a right of survivorship, which in turn is founded upon co-ownership. Their Lordships point out that the inconsistency is apparent and not real. It is the general law of the Mitakshara that regulates the partible and impartible property alike belonging to a coparcenery, but in the case of impartible property, custom has superseded the general law in certain respects. As regards the right of survivorship, the general law not having been superseded by custom, that right still remains and that is what was held in *Baijnath's case*[6]. To this extent the estate

1. (1907) 17 M.L.J. 201: I.L.R. 30 Mad. 255.
2. (1932) 63 M.L.J. 196: L.R. 59 I.A. 331: I.L.R. 59 Cal. 1399 (P.C.).
3. (1888) L.R. 15 I.A. 51: I.L.R. 10 All. 272 (P.C.).
4. (1899) 9 M.L.J. Sup. 1: L.R. 26 I.A. 83: I.L.R. 22 Mad. 383 (P.C.).
5. (1918) 35 M.L.J. 392: L.R. 45 I.A. 148: I.L.R. 41 Mad. 778 (P.C.).
6. (1921) 40 M.L.J. 387: L.R. 48 I.A. 195: I.L.R. 43 All. 228 (P.C.).

retains its character of joint family property and right of co-ownership is preserved. Their Lordships cite a passage from the judgment of Sir J. Colville in *Chowdhury Chintamun Singh* v. *Nowlukho Konwari*[1], where the right of the junior members is referred to as a contingent right of property, which they can part with or transfer. After full discussion, the position is this summed up by their Lordships:

"Though the other rights which a coparcener acquires by birth in joint family property no longer exists, the birth-right of the senior member to take by survivorship still remains. Nor is this right a mere *spes successionis* similar to that of a reversioner succeeding on the death of a Hindu widow to her husband's estate. It is a right which is capable of being renounced and surrendered. Such being their Lordships' view it follows that in order to establish that a family governed by the Mitakshara in which there is an ancestral impartible estate has ceased to be joint, it is necessary to prove an intention, expressed or implied, on the part of the junior members of the family to renounce their right of succession to the estate." (*Shiba Prasad Singh* v. *Prayag Kumari Debi*[2].)

What this decision lays down is the very opposite of what has been held in *Ramasami Naik* v. *Ramasami Chetti*[3]. The contention was put forward that the interest possessed by the junior members, if any, was only a *spes successionis* and that contention was definitely rejected. It is noticeable that in the passage quoted above, the right of the senior member to take by survivorship is referred to as his *birth-right* capable of being renounced or surrendered.

In *Collector of Gorakhpur* v. *Ram Sundar Mal*[4], their Lordships, in the judgment delivered by Lord Blanesburgh, reaffirm this doctrine. They first point out that the *Sartaj Kuari's case*[5] and the *first Pittapur case*[6] appeared to be destructive of the rule that an impartible Zamindari could be in any sense joint family property, but they go on to say that this view, apparently implied in these cases, was definitely negatived by Lord Dunedin when delivering the judgment in *Baijnath's case*[7]. Then they make the following significant observation:—

"One result is at length clearly shown to be that there is now no reason why the earlier judgments of the Board should not be followed, such as, for instance, the *Chellapallee case*[8] which regarded their right to maintenance,

1. (1875) L.R. 2 I.A. 263: I.L.R. 1 Cal. 153 (P.C.).
2. (1932) 63 M.L.J. 196: L.R. 59 I.A. 331 at 345 and 346: I.L.R. 59 Cal. 1399 (P.C.).
3. (1907) 17 M.L.J. 201: I.L.R. 30 Mad. 255.
4. (1934) 67 M.L.J. 274: L.R. 61 I.A. 286: I.L.R. 56 All. 468 (P.C.).
5. (1888) L.R. 15 I.A. 51: I.L.R. 10 All. 272 (P.C.).
6. (1899) 9 M.L.J. Sup. 1: L.R. 26 I.A. 83: I.L.R. 22 Mad. 383 (P.C.).
7. (1921) 40 M.L.J. 387: L.R. 48 I.A. 195: I.L.R. 43 All. 228 (P.C.).
8. (1901) 10 M.L.J. 294: L.R. 27 I.A. 151: I.L.R. 24 Mad. 147 (P.C.).

Sellappa Chettiar v. Suppan Chettiar.

Venkatasubba Rao, J.

however limited, out of an impartible estate as being based upon the joint ownership of the junior members of the family." (*Collector of Gorakhpur* v. *Ram Sundar Mal*[1].)

After further discussion, their Lordships observe that while the power of the holder of an impartible Raj to dispose of it by deed or by will remains definitely established, the right of the junior branch to succeed by survivorship on the extinction of the senior branch has also been definitely and emphatically reaffirmed: "nor must this right be whittled away; it cannot be regarded as merely visionary".

In view of these pronouncements of the Judicial Committee we can no longer regard *Ramasami Naik* v. *Ramasami Chetti*[2] which held the interest of the coparceners to be a mere *spes successionis*, as having laid down the correct law.

It is unnecessary to consider whether a member other than the Zemindar in possession can, by transferring his interest, bring in a stranger; nor is it necessary to enquire whether one member can, by making a transfer, affect the interest possessed by members other than himself. (See *Sivagnana Tevar* v. *Periasami*[3], dealing with Padamattur estate in Sivaganga Zemindari). For, under the Impartible Estates Act no member could make an alienation which would enure beyond his own lifetime. We have therefore here no difficulty in holding that the mortgage in question to the extent of the first item of the consideration affects the life interest of the first defendant by reason of his having joined in the transaction.

Then passing on to the next item of the consideration, namely, Rs. 3,408, we must hold that the debt to that extent was borrowed for a legal necessity. The plaintiff has deposed that the amount was utilised in meeting the expenses of the marriage of the late Zamindar's daughter. The evidence stands uncontradicted. The mortgage was executed in January, 1916, and the marriage had been performed in the previous July. In Exs. D and D-1, written by the Zamindar to the plaintiff's father in June and July, 1915, he refers to the proposed marriage and applies for a loan. A sum of Rs. 500 was borrowed under Ex. C, a promissory note executed in December, 1913, by both the father and the son. The plaintiff

1. (1934) 67 M.L.J. 274: L.R. 61 I.A. 286 at 302: I.L.R. 56 All. 468 (P.C.).
2. (1907) 17 M.L.J. 201: I.L.R. 30 Mad. 255.
3. (1878) L.R. 5 I.A. 61: I.L.R. 1 Mad. 312 (P.C.).

Sellappa Chettiar v. Suppan Chettiar.

Venkatasubba Rao, J.

deposes that they borrowed this amount for the purpose of making jewels in view of the intended marriage. The plaintiff's evidence is consistent with the recital not only in Ex. A, the mortgage deed, but in Ex. F under which the contesting defendants claim. We must therefore hold that this extent what has passed to the plaintiff under the mortgage is the entire estate in the properties in question and not merely the life interests of the two executants, namely, the late Zamindar and the first defendant.

The only contention that remains is as regards interest. We agree with the learned Judge that the stipulation in respect of it does not amount to a penalty and that the amount claimed is therefore due.

Lastly, the direction in paragraph 5 of the decree as to the passing of a personal decree, it is conceded, cannot stand and it is accordingly deleted.

In the result, for recovering Rs. 3,408 and the interest thereupon, the mortgaged items can be sold, but for recovering the remaining sum, namely, Rs. 4,892 with interest upon it, what can be sold is the first defendant's life interest alone in those properties, and we accordingly give judgment to that effect. The lower Court's order as to the costs of the suit will stand, three-eighths of those costs being assigned to the former amount and five-eighths to the latter.

As regards the costs of the appeal, our order is that the appellants (defendants 3 to 5) shall pay two-thirds of the plaintiff-respondent's costs. These costs also will be apportioned in the manner stated above.

In the memorandum of objections we make no order as to costs. Time for redemption will be six months from now.

K.C. *Decree accordingly.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Madras.]

PRESENT:—LORD ROCHE, SIR SHADI LAL AND SIR GEORGE RANKIN.

The United Motor Finance Company .. *Appellants**

v.

Messrs. Addison and Company, Limited .. *Respondents.*

P.C.

The United Motor Finance Company *v.* Messrs. Addison & Co., Ltd.

Deceit—Suit for damages—Intention to injure, to cheat or to deceive—Sufficient basis for an action of deceit—Law relating to actions for deceit—Measure of damages—Motor hire purchase system—Misrepresentations as to price and deposit—Financing firm put to loss—Right to recover damages.

The plaintiff firm and the defendant company had a course of dealing between them by which the plaintiff firm acted as financiers to enable the customers of the defendants to buy motor cars on a system of hire purchase. The defendants being owners of a car would agree with their customer upon a price. The customer would pay immediately one-third of the price and the insurance premium. The plaintiff firm would become purchasers of the car from the defendants by paying to the defendants the remaining two-thirds of the price and would enter into a hire purchase agreement with the customer whereby the customer on getting delivery undertook to pay to the plaintiff firm the amount of such two-thirds within a year. From the beginning, when the arrangement between the parties for future business was made orally, it was expressly stipulated by the plaintiff firm that it would pay two-thirds of the actual price to the customer and no more, and that the customer should pay not less than one-third of the price as a condition of the transaction being entered into by the plaintiff firm at all. The fraud charged in the plaint was that the defendants throughout represented that these stipulations were being observed whereas in certain cases the defendants had allowed a discount to the customer off the nominal price and allowed him to set it off against part of the initial deposit, or had effected the same result by buying from the customer a used car at a price which was greater than any estimate of its value could justify, or had forwarded the proposal form and other documents to the plaintiff firm after the customer had been allowed to use the vehicle for such a period that the transaction did not relate to a new car but to a used car of depreciated value which afforded no security to the plaintiff firm in respect of the hirer's liability for the instalments. The plaintiff firm having sued for damages for deceit the trial Judge awarded damages on the basis of what the plaintiffs had lost by entering into the transactions. On appeal, a Division Bench of the High Court varied the findings of the trial Judge with respect to certain items. The plaintiff firm thereupon preferred an appeal to the Privy Council.

Held, that the trial Judge had correctly applied the law as laid down in *Derry* v. *Peek*, (1889) L.R. 14 App. Cas. 337, with reference to actions for deceit, and that the intention to deceive was not necessarily an intention to injure or to cheat, and if the defendants made to the plaintiff firm a statement as to price and deposit which they knew to be untrue, and did so with a view to the plaintiff firm entering into a purchase, there was sufficient basis for an action of deceit, provided the plaintiff firm had relied upon the statement.

---

* P. C. Appeal No. 60 of 1936. 10th December, 1936.

P.C.

The United Motor Finance Company *v.* Messrs. Addison & Co., Ltd.

Held, further, that the resulting damages could not be modified on the footing that though in the absence of misrepresentation the plaintiff firm would not have made the contract with the defendants or with the hirer which it did in fact make, nevertheless even if it had known the facts it would have entered into some other contract and thus lost money in any event, and that the plaintiff firm was entitled to damages on the basis of what the plaintiffs had lost by entering into the transactions.

Derry v. *Peek*, (1889) L.R. 14 App. Cas. 337, applied.

Decision of the Madras High Court (Varadachariar and Burn, JJ.), reversed.

This is an appeal from an appellate decree of the High Court of Judicature at Madras dated the 3rd February, 1936, which modified a decree made on the 9th May, 1934, by Mr. Justice Stone sitting on the Original Side of the said Court.

The course of dealing between the parties and the fraud alleged against the defendant are fully set out in the judgment of their Lordships. The trial Judge (Stone, J.) held that the true price payable was the price paid by the hirer and that the defendants had no justification to charge the plaintiffs a higher price; that the defendants deliberately withheld information of the trading in, and also that where there had been trading in for an inadequate price, the inflated price could not be charged to the plaintiffs. The Court of Appeal (Varadachariar and Burn, JJ.) held that the over-statement of the price was not relevant to the case, and that the defendants could do what they liked with the profits which had previously been made on a sale; and also that trading in was justifiable, and that the amount allowed was a matter for the defendants and not for the plaintiffs.

De Gruyther, K.C. and *S.P. Khambatta* for Appellants.—The stipulation as to price between the parties agreed to orally at the interview between the directors of the defendant company and the partner of the plaintiff firm was an express stipulation that the plaintiff would pay two-thirds of the price to the hirer and that the hirer should not pay less than one-third of that price. The defendants' documents represented that this stipulation had been observed strictly. Where the hirer had been allowed a discount the plaintiff would never have accepted the contract to pay the higher price if the true facts had been disclosed. The defendants were in a position of active confidence and were under a legal obligation to act honestly and to establish that they had so acted. The plaintiffs had to rely on the defendant's representations as to price and as to initial deposit and but for those representations the plaintiff would never have entered into the suit transactions. It is not necessary for the plaintiffs to establish fraud on the part of

P.C.

The United Motor Finance Company *v.* Messrs. Addison & Co., Ltd.

the defendants but if it were necessary, then the plaintiffs had given sufficient proof of such fraud. The view taken by the trial Judge in regard to the price chargeable to the plaintiffs, the discount, and the trading in, is the right view and the view taken by the Division Bench is erroneous. The plaintiffs are entitled in law to the full damages claimed on the basis of what the plaintiffs have lost by entering into the transactions.

S. P. Khambatta followed for Appellants.—The initial deposit was made heavy with the express purpose of acting as a deterrent to the hirer and for the protection of the plaintiffs, its object being to prevent the hirer turning a new car into a second-hand car, depreciating it, then putting it on the hands of the plaintiffs in that condition (see *Auto Supply Co., Ltd.* v. *Raghunatha Chetty*,[1] per Coutts-Trotter, C.J.). The defendants have made a fraudulent misrepresentation such as will maintain an action of deceit inasmuch as the misrepresentation was made with intent to mislead the plaintiff into accepting the transaction. (See Kerr on Fraud, pp. 29 and 30.)

A. M. Dunne, K.C. and *Sir T. Strangman* for Respondents.—The view taken by the Division Bench of the High Court that the over-statement of the price was not relevant to the contract and that the defendants could do what they liked with the profits which had been made on the previous sale was correct. The plaintiffs have not given sufficient proof of the terms of the contract as made by the oral agreement between the parties. With regard to the discounts allowed to the hirer and the cases of trading in the plaintiffs had knowledge of the practice. The plaintiffs have not sufficiently established upon the evidence the allegation that the defendants appreciated the misrepresentations. The representations even if not true were not such as would ground a charge of fraud. The plaintiff's case lies on deceit and the plaintiffs have failed to establish an intention on the part of the defendants to cheat. The trial Judge wrongly applied the law as laid down in *Derry* v. *Peek*[2].

Sir T. Strangman followed for the respondents and referred to the evidence on record of the arrangement arrived at between the parties.

10th December, 1936. Their Lordships' judgment was delivered by

Sir George Rankin.

Sir George Rankin.—The plaintiff firm sues the defendants, who are a limited company trading in Madras, for

1. (1929) 57 M.L.J. 618 at 620, 621.
2. (1889) L.R. 14 App. Cas. 337.

P.C.

The United Motor Finance Company *v.* Messrs. Addison & Co., Ltd.

Sir George Rankin.

damages for fraud in connection with the sale of motor vehicles. The parties had been dealing with each other since 1924, and until 1929 the dealings gave rise to no complaint, but in respect of 40 transactions of 1929 and 1930, the present action was brought on 7th August, 1933, on the Original Side of the High Court at Madras. It was tried by Stone, J., in 1934 and by his decree dated 9th May, 1934, he found for the plaintiff firm in respect of 25 transactions, directing an inquiry as to damages. On appeal, a Division Bench (Varadachariar and Burn, JJ.) varied his findings, with the result that the plaintiff firm succeeded as to 12 items, but in respect of some of these damages were directed to be assessed on a different basis from that adopted by Stone, J.

On this appeal to His Majesty the decision of the Division Bench was complained of in respect of 35 out of the original 40 transactions; but, the appeal not having been pressed as to certain items and their Lordships not having called upon the respondents in respect of certain others, 19 transactions are all that need be canvassed in this judgment. The decree of the Division Bench will stand as regards the following items, *viz.*, 1, 2, 4, 6, 10, 18, 20, 21, 22, 23, 29, 32, 33, 34, 39 and 40. In the case of items 3, 5, 8, 9 and 19 the decision of Stone, J., in favour of the defendants has not been challenged.

The course of dealing between the parties was that the plaintiff firm acted as financiers to enable customers of the defendants to buy motor cars (or buses) on a system of hire purchase. The defendants being owners of a car would agree with their customer upon a price. The customer would pay immediately one-third of the price, the insurance premium for a year and the cost of the stamp for the agreement in writing. The plaintiff firm would become purchasers of the car from the defendants by paying to the defendants the remaining two-thirds of the price (less an agreed commission) and would enter into a hire-purchase agreement with the customer whereby the customer on getting delivery undertook to pay to the plaintiff firm the amount of such two-thirds *plus* certain further sums ("charges") by instalments within a year.

Before May, 1929, the plaintiff firm had no representative or office in Madras; and the transactions were entered into by the plaintiff firm's Calcutta office receiving from the defendants

P.C.

The United Motor Finance Company *v.* Messrs. Addison & Co., Ltd.

Sir George Rankin.

proposal forms, invoices, letters, etc., by post, and answering the same by sending cheques, etc., in like manner. In May, 1929, however, the plaintiff firm appointed one Ponting to act for them. The exact extent of his authority is a matter of some dispute between the parties, but a main object of his appointment was to accelerate the carrying out of the transactions. Ponting would sign hire-purchase forms and authorise delivery to the defendants' customers; telegraphing to Calcutta the amount for which the plaintiff firm's cheque was required and posting the proposal forms, invoices, etc., to Calcutta.

In December, 1930, the plaintiff firm stopped doing business with the defendants because of the matters now complained of. From the beginning in 1924, when the arrangement between the parties for future business was made orally by Miss Thear (Mrs. Palmer) with the directors of the defendant company, it was expressly stipulated by the plaintiff firm that it would pay two-thirds of the actual price to the customer and no more, and that the customer should pay not less than one-third of that price as a condition of the transaction being entered into by the plaintiff firm at all. The fraud charged by the plaint, so far as their Lordships are now concerned with it, is that the defendants, by the documents forwarded to the plaintiff firm, throughout represented that these stipulations were being observed, the price being stated at a definite figure and the customer represented as having paid a deposit of a definite amount (not less than one-third of the price) ; whereas in certain cases the defendants—

(*a*) had allowed a discount to the customer off the nominal price and allowed him to set it off against part of the initial deposit.

(*b*) had effected the same result by buying from the customer a used car at a price which was greater than any estimate of its value could justify.

(*c*) had forwarded the proposal form and other documents to the plaintiff firm after the customer had been allowed to use the vehicle for such a period that the transaction did not relate to a new car but to a used car of depreciated value which afforded no security to the plaintiff firm in respect of the hirer's liability for the instalments.

In all the cases to which these complaints relate loss has resulted to the plaintiff firm by reason that the hirers have

P.C.

The United Motor Finance Company v. Messrs. Addison & Co., Ltd.

Sir George Rankin.

failed to pay the instalments which they undertook to pay. The plaintiff firm says that it would never have entered into any of these transactions had it been told the real facts at the time. In particular, and with reference to the initial deposit by the hirer of one-third of the price, its case is that for hire-purchase transactions such a stipulation was essential in view of the heavy depreciation immediately involved when a new car is taken into use: unless a sufficient part of the price is paid on delivery of the car, a time may come when the hirer by use of the car has caused more wear than he has paid for, and when the value of the car as a used car may seem no great bargain for the instalments which have still to be paid, and be no good security therefor.

The complaints above described under headings (*a*), (*b*) and (*c*) have reference to the transactions referred to in the plaintiff firm's particulars by numbers as follows:—

(*a*) 24, 25, 26.
(*b*) (i) 7, 15, 27, 36, 38.
(ii) 11, 12, 13, 14, 35, 37.
(*c*) 16, 17, 28, 30, 31.

(*a*) That the defendants gave to their customer, the "hirer," discounts in the three transactions mentioned under this head is not disputed. The price and the discount were:—

			Rs.	Rs.
Item 24	..	..	5,050	325 0 0
Item 25	..	..	4,450	302 4 0
Item 26	..	..	4,175	177 12 0

In each case the discount being allowed against the initial payment resulted not only in the plaintiff firm paying more than two-thirds of the real price but also in the hirer paying less than one-third thereof. The trial Judge, being of opinion that the plaintiff firm would not have entered into the transactions but for the defendants' representations on these points, gave the plaintiff firm damages "on the basis of what the plaintiffs have lost by entering into the transactions." The Division Bench disallowed the plaintiffs' claim altogether, being of opinion that the practice of " taking trade-in cars and allowing large discounts " was known to and winked at by those in charge of the plaintiffs' Calcutta office and that the defendants must have honestly believed that the initial deposit was its own concern. In their Lordships' opinion the view taken by the

P.C.

The United Motor Finance Company v. Messrs. Addison & Co., Ltd.

Sir George Rankin.

trial Judge was correct. The evidence does not justify the opinion of the Division Bench that the plaintiff firm's Calcutta office knew of these discounts and the evidence given on behalf of the plaintiff firm is sufficient to establish that the plaintiffs relied on the defendants' representations as to price and as to initial deposit. Ponting's knowledge of the practice complained of is not proved, but their Lordships are of opinion that the evidence as to Ponting's duties and authority makes it impossible to impute his knowledge to the plaintiff firm. The trial Judge in their Lordships' opinion correctly understood and applied the law as laid down in *Derry* v. *Peek*[1], with reference to actions for deceit. The only director of the defendant company to be called was Mr. F. G. Luker, of whom the Division Bench said that "he seems to know very little and remembers even less of the suit transactions"; but as Stone, J., who saw him in the witness-box, was of opinion that he gave his evidence very fairly and frankly and was a man of integrity, their Lordships desire to make clear that the fraud practiced on the plaintiff firm was not his work nor did he know of it at the time. The defendants' evidence does not enable the individual responsible therefor to be specified in each case, but it is to be noted, even as regards the salesman responsible for carrying out each transaction, that in the view of Stone, J., and in their Lordships' view, the representations complained of were not made, so far as can be seen, with any intention to injure the plaintiff firm. The expectation was that each transaction would be carried out in due course, each hirer fulfilling his obligations. But as Stone, J., rightly held, the intention to deceive is not necessarily an intention to injure or to cheat, and if the defendants made to the plaintiff firm a statement as to price and deposit which they knew to be untrue, and did so with a view to the plaintiff firm entering into a purchase, there is a sufficient basis for an action of deceit, provided always that the plaintiff firm relied upon the statement. No doubt if it could be said that the statement made by the defendants was untrue but that the person making it did not appreciate that it was not the truth, this would be consistent with honesty and would ground no charge of fraud. But their Lordships cannot accept the suggestion that salesmen of motor cars would have any difficulty in appre-

1. (1889) L.R. 14 App. Cas. 337.

ciating the elements of falsity in the representations complained of. Nor can they modify the resulting damages on the footing that though in the absence of misrepresentation the plaintiff firm would not have made the contract with the defendants or with the hirer which it did in fact make, nevertheless even if it had known the facts it would have entered into some other contract and thus lost money in any event. It is not known, for example, whether any of the hirers could or would have paid a deposit of one-third of the real price, or what effect such payment might have had upon his subsequent action. It cannot be assumed that the plaintiff firm would have been willing to depart from its well-considered terms—at all events without making special inquiry as to the hirer or asking for the defendants' guarantee.

(*b*) The cases in which complaint is made that by allowing an excessive price for a used car the defendants in effect gave to the hirer an allowance off the price, fall into two groups. In respect of the transactions numbered 7, 15, 27, 36 and 38 the Division Bench did not disagree with the trial Judge as regards the fact that the price allowed for the used car was such as to amount to the grant of a discount upon the price of the new car. In the cases numbered 11, 12, 13, 14, 35 and 37, however, the Division Bench were not satisfied that the price allowed for the used car was more than a fair price, at least in the opinion of the defendants.

Their Lordships having examined these items in detail accept the view of the Division Bench in the case of No. 13, but in each of the other cases have arrived at the same conclusion as the trial Judge. In respect therefore of 10 of the 11 cases coming under this heading the plaintiff's claim succeeds and the measure of damages must be the same as under heading (*a*).

(*c*) The last group consists of five items. In the case of Nos. 16 and 17 Stone, J., had found for the defendants, but as regards Nos. 28, 30, 31 he had given damages "on the basis of what the plaintiffs have lost by entering into the transactions." The complaint here is that the defendants put forward to the plaintiff firm cars which had been for a considerable time in use as though they were new cars. The Division Bench, finding this to be the fact, held that the plaintiff firm could only be allowed damages to the extent of two-thirds of the deprecia-

P.C.

The United Motor Finance Company *v.* Messrs. Addison & Co., Ltd.

Sir George Rankin.

tion on the value of the car. Their Lordships are of opinion that the facts in each of these five cases entitle the plaintiff firm to recover as damages whatever it has lost by reason of its entering into the transaction.

The result is that as regards 18 out of the 19 cases comprised in groups (*a*), (*b*), (*c*) above the appeal succeeds. The plaintiff firm is entitled to damages and the measure of damages in each case is that described in the decree of Stone, J., by the words "on the basis of what the plaintiffs have lost by entering into the transaction." Their Lordships will humbly advise His Majesty accordingly.

As regards costs of the trial Court the plaintiff firm should get its costs calculated on the amount ultimately to be decreed to it, but as against that should pay to the defendants one-half of the defendants' costs. The defendants, however, must pay the plaintiff firm's costs of the appeal to the Division Bench and of this appeal. There will be no order with reference to the costs of the examination of Mr. W. H. Luker on commission.

Solicitors for Appellants: *T. L. Wilson & Co.*

Solicitors for Respondents: *Sanderson Lee & Co.*

S. P. K. *Appeal allowed.*

B. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATARAMANA RAO.

Roshan Chinna Minulla Hussain Saheb .. *Petitioner** (*Defendant*)

v.

The Municipal Council, Adoni by its Commissioner A. Raghava Reddi .. *Respondent* (*Plaintiff*).

Roshan Chinna Minulla Hussain Saheb *v.* Municipal Council, Adoni.

Madras District Municipalities Act (V of 1920), Ss. 86 and 345—Profession tax—Suit for recovery—Limitation—Starting point—Date of service of bill demanding payment—Whether material.

Under S. 345 of the Madras District Municipalities Act the period of limitation for a suit to recover the amount due by the assessee by way of property tax is three years from the date when a suit might first have been instituted, and for purposes of this section the period of limitation should be computed from the date of expiry of time prescribed for payment and not from the date when the bill demanding payment was served on the assessee.

---

* C. R. P. No. 619 of 1935. 30th November, 1936.

Roshan Chinna Minulla Hussain Saheb v. Municipal Council, Adoni.

Petition under S. 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the District Munsif of Bellary in S. C. S. No. 255 of 1934.

K. Srinivasa Rao for Petitioner.

D. R. Krishna Rao for Respondent.

The Court delivered the following

JUDGMENT.—Two questions have been argued by Mr. Srinivasa Rao in this Revision Petition (1) whether the claim for assessment by the Municipal Council for the year 1930-1931 is barred by limitation and (2) whether the claim for the subsequent years 1931-1932 and 1932-1933 is illegal on the ground that the land is agricultural land. The lower Court held that the claim was not barred by limitation on the ground that notice of demand was served on the 18th March, 1931 and the suit was instituted within three years from the said date. The learned Judge took the view that under S. 345 the period of three years runs from the date on which distraint might first have been made. It seems to me that this view is unsound. Under S. 86 of the District Municipalities Act which governs this case, the property tax shall be paid by the owner of the assessed premises within 30 days after the commencement of the half year. So under this section the petitioner should have paid the amount due for the first half year within the 1st May, 1930 and the amount due for the second half year within the 1st November, 1930. Under S. 345 the period of limitation for a suit to recover the said sum is 3 years from the date when a suit might first have been instituted. In this case a suit might first have been instituted on the 1st May, 1930, or 1st November, 1930 and 3 years having elapsed from that date the claim is admittedly barred by limitation. Mr. Krishna Rao contends that under r. 30 the limitation really commences after the expiry of 15 days from the service of the bill demanding payment. In my opinion that rule really does not apply to the case of a suit. R. 29 says:

"Where any tax not being a tax in respect of which a notice has to be served under S. 95, 102 or 108 . . . . is due from any person the chairman shall serve upon such person a bill for the sum due before he proceeds to enforce the provisions of r. 30. The service of a bill is therefore necessary for the enforcement of the provisions of r. 30".

Turning to r. 30 it will be seen that cl. (1) of that rule provides for distraint and cl. (2) provides for a case of prosecution. It is only in the case of a distraint the service of a

Roshan Chinna Minulla Hussain Saheb *v.* Municipal Council, Adoni.

bill is a condition precedent. Similarly in the case of a prosecution it should be shown that a sufficient distraint of the defaulter's property was impracticable. So far as the suit is concerned, the only provision in the rule is this: "Nothing herein contained shall preclude the Council from suing in a Civil Court for any tax due to it under the Act." This provision was introduced *abundanti cautela* for the purpose of indicating that the right of suit is not affected by the provisions of this rule. I am therefore of opinion that the claim for the recovery of assessment for the year 1930-1931 is barred by limitation.

So far as the second question is concerned, it depends upon the fact whether the land is agricultural land. The learned District Munsif negatived the defendant's claim on the ground that there was no evidence that during the years of assessment the land was used as agricultural land and he also relied upon P. W. 1 in support of his conclusion. It seems to me that the learned Judge is wrong. There is evidence afforded by Exs. F and II, wherein it is distinctly indicated that the land was used as agricultural land from Fasli 1332 and P. W. 1 in his evidence clearly says that he does not know anything about the matter. On the evidence on record the land must be treated as agricultural land during the years under assessment. I therefore reverse the decision of the learned Judge even in regard to this question.

In the result the Civil Revision Petition is allowed and the plaintiff's suit is dismissed with costs throughout.

B. V. V. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW.

K. V. Sreenivasa Ayyangar and another .. *Petitioners**

v.

Hindu Religious Endowments Board, Madras and others .. *Respondents in both.*

Sreenivasa Ayyangar *v.* H. R. E. Board, Madras.

Certiorari—*Writ of—Orders of the Board of Religious Endowments in exercise of powers vested by S. 18 of the Act (II of 1927) as amended—Petitioners—One, a member of a temple committee and another an aspirant to the office of trustee of a temple—Administrative orders not affecting prejudicially the petitioners—No reason for writ issuing—No* locus standi *for petitioners to complain.*

* C. M. P. Nos. 4751 and 4680 of 1936. 15th December, 1936.

The Religious Endowments Board passed orders with regard to a certain District Circle Committee thus: "the committee is requested not to fill up the vacancies that may arise on the Board of Trustees of the above temple by efflux of time pending notification proceedings, etc." and also "in view of the direction in Boards memo. notification, the non-hereditary trustees of the Devasthanam, whose terms of office expire during the pendency of notification proceedings, may continue to function as trustees till the conclusion of the said proceeding". The proceedings referred to were proceedings taken under Chapter VI-A of the Hindu Religious Endowments Act (II of 1927) as amended by Act XII of 1935. The Board were taking proceedings under this Chapter in respect of the temple in question and the proceedings were then pending before the Board. The management was governed by a scheme framed by Court. Till the notification under Chapter VI-A of the Act was complete, the Board has no power to modify or alter the scheme framed by the Court. Two petitions were presented by two persons, one a member of the temple committee in question and the other an aspirant for the office of the trustee, for the issue of writs of *certiorari* restraining the Board in respect of the two orders stated above.

Held, that the wording of the orders and the circumstances which had led to the passing of the orders clearly showed that they were meant to be passed in administrative capacity. Even if it was true that those orders might have the effect of prejudicing the rights of private parties, it did not follow that the orders would thereby be necessarily of a judicial nature. The orders were passed in the exercise of general powers of superintendence and control vested in the Board by S. 18 of the Act. They were addressed to a subordinate body like the temple committee and they did not purport to decide any rights of parties. Even otherwise, neither of the petitioner had any *locus standi* to apply for a writ of *certiorari* in respect of the orders in question; because the scheme sanctioned by the Court gave the power of electing trustees to the committee constituted under Act XX of 1863. There was no such committee in existence when the Board passed the orders in question. The committee that was actually functioning was one constituted by Act II of 1927.

The Board has such power and the exercise of such power is an administrative act [vide *Anandacharlu* v. *Hindu Religious Endowments Board*, (1936) M.W.N. 1045].

Strictly speaking neither of the petitioners could say that any of his rights had been affected prejudicially by the orders of the Board and there would be no reason why, if the petitioners' right had not been affected, the power of issuing writ of *certiorari* should be exercised in their favour.

Petitions praying that in the circumstances stated in the affidavits filed therewith the High Court will be pleased to issue writs of *certiorari* calling for the records relating to the order issued by the Board of Commissioners for the Hindu Religious Endowments, Madras, directing the Trichinopoly Circle Temple Committee not to appoint any person to the vacancy occurring in the Board of Trustees of the Sri Renganathaswami temple, Srirangam, and further directing continuance of the present members of the Board of Trustees in Office, and to quash the aforesaid order of the Endowments Board.

Sreenivasa Ayyangar v. H. R. E. Board, Madras.

K. Bhashyam Aiyangar for *T. R. Sreenivasan* for Petitioners.

B. Sitarama Rao, P. V. Rajamannar, K. Subba Rao and *A. Srirangachariar* for Respondents.

The Court made the following

ORDER.—These are petitions presented by two persons, one a member of the Trichinopoly Circle Temple Committee, and the other who is an aspirant for the office of trustee for the Sri Renganathaswami temple in Trichinopoly District, for the issue of writs of *certiorari* in respect of two orders dated 16th October, 1936, and 3rd November, 1936, respectively, made by the Commissioners for the Hindu Religious Endowments, Madras. The first order runs as follows:—

"The Trichinopoly Circle Temple Committee is requested not to fill up the vacancies that may arise on the Board of Trustees of the above temple by efflux of time, pending notification proceedings No. 26 of 1936. The committee is also requested to state the date or dates on which such vacancies are to arise within the period of the next six months".

The subsequent order runs as follows:—

"In view of the directions in Board's Memo. Notification No. 26 of 1936-4 dated 16th October, 1936, the non-hereditary trustees of the Devasthanam, whose terms of office expire during the pendency of notification proceedings, may continue to function as trustees till the conclusion of the said proceeding".

The notification proceedings referred to in these orders are proceedings taken under Chapter VI-A of the Hindu Religious Endowments Act (II of 1927) as amended by the Act XII of 1935. The Board were taking proceedings under this chapter in respect of the temple in question and the proceedings were then pending before the Board. The management of the temple was governed by a scheme framed by Court the details of which are to be found in the case reported in *Sitharama Chetty* v. *Sir S. Subramania Aiyar*[1]. There can be no doubt that till the notification under Chapter VI-A of the Act is complete, the Board has no power to modify or alter the scheme framed by the Court. This position is not contested by the Board's Advocate. It is however contended that the orders in question do not amount to any modification or alteration of the scheme sanctioned by the Court and that the orders in question must be deemed to have been passed with jurisdiction in view of the general powers of superintendence and control vested in the Board by S. 18 of the Act. A preliminary objection was also

1. (1915) 30 M.L.J. 29: I.L.R. 39 Mad. 700.

taken to these petitions on the ground that the orders sought to be brought up on writ of *certiorari* are administrative orders and not judicial acts, in respect of which alone a writ of *certiorari* will lie. I have had to consider the question as to what is an administrative order as distinguished from a judicial act recently in *Sri Emberumanar Jeer Swamigal* v. *The Board of Commissioners for Hindu Religious Endowments, Madras and others*[1]. The general rule laid down by Atkin, L.J., in *Rex* v. *Electricity Commissioners*[2] which was accepted and explained by Slesser, L.J., in *Rex* v. *London County Council*[3] is to the effect that:

"Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority, they are subject to the controlling jurisdiction of the King's Bench division".

In *Rex* v. *London County Council*[3], Slesser, L. J., added that:

"It is not necessary that it should be a Court in the sense in which this Court is a Court; it is enough if it is exercising. after hearing evidence, judicial functions in the sense that it has to decide on evidence between a proposal and an opposition".

In the particular case before me, it is obvious that the Commissioners were not hearing evidence or exercising any judicial functions. There was no proposal and an opposition before them. The wording of the orders and the circumstances which led to the passing of the orders clearly show that they were meant to be passed in an administrative capacity. Even if it be true that these orders may have the effect of prejudicing the rights of private parties, it does not follow that the orders would thereby be necessarily of a judicial nature. Where there is no duty imposed by law to decide anything after weighing the material put by both parties, the order passed cannot be regarded as a judicial one. In this particular case, I have no doubt that the Board did not intend and indeed had not the power to decide anything judicially as regards the stopping of any election of a trustee or the continuance in office of any trustee whose term had expired. The orders were passed in the exercise of the general powers of superintendence and control vested in the Board by S. 18 of the Act. They were addressed to a subordinate body like the Temple Committee and they do not purport to decide any rights of parties. Even otherwise,

1. (1936) 71 M.L.J. 588. 2. (1924) 1 K.B. 171.
3. (1931) 2 K.B. 215.

Sreenivasa Ayyangar *v.* H. R. E. Board, Madras.

I am of opinion that neither of the petitioners has any *locus standi* to apply for a writ of *certiorari* in respect of the orders in question. The scheme sanctioned by the Court gives the power of electing trustees to the Devasthanam Committee constituted under Act XX of 1863. There is no such committee in existence and there was no such committee in existence when the Board passed the orders in question. This is conceded as the committee constituted under Act XX of 1863 ceased to exist as soon as Act II of 1927 became law. The present committee, which is known as the Trichinopoly Circle Temple Committee, is not a committee constituted under Act XX of 1863 but under Act II of 1927. It would thus follow that neither the committee nor any member of it has any right to elect a trustee for the temple in question. In fact, the scheme became impracticable so far as appointment of trustees is concerned after the Temple Committee constituted under Act XX of 1863 ceased to exist, and if any trustee is to be appointed now, the appointment must be made by the Board in the exercise of its general powers. That the Board has such power and that the exercise of such power is an administrative act has been held by a Bench in *Anandacharlu* v. *Hindu Religious Endowments Board*[1]. Strictly speaking, therefore, neither of the petitioners can say that any of his rights have been affected prejudicially by the orders of the Board, and there is no reason why if the petitioner's rights have not been prejudicially affected the discretionary power of issuing a writ of *certiorari* should be exercised in their favour. It therefore follows that these petitions must fail and they are accordingly dismissed with costs. Vakil's fee being fixed at Rs. 50 in each case.

Memo. of costs will follow.

K. C. *Petitions dismissed.*

---

1. (1936) M.W.N. 1045.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VARADACHARIAR.

Filix Joseph Sarprasadam and others .. *Appellants* (Defendants 1 to 3)*

v.

P. Rm. Sp. Subramania Chettiar .. *Respondent (Plaintiff).*

Filix Joseph Sarpra-s adam *v.* Subramania Chett ar.

Indian Succession Act (XXXIX of 1925), S. 321—Pronote by executrix for probate expenses—Creditor if can have recourse to the estate—S. 321, if creates a charge for the amount—Scope of S. 321.

A creditor who lends money on a promissory note executed by an executrix is not entitled to direct recourse against the testatrix's estate and S. 321 of the Succession Act does not declare a charge on the estate in favour of the lender for amounts lent by him for the expenses of obtaining probate, etc., Ss. 319 to 323 only regulate the claims of priorities *inter se* among various kinds of creditors and does not purport to regulate the rights of creditors against the estate of the testatrix.

Appeal against the decree of the District Court of Trichinopoly in Appeal Suit No. 1 of 1934 preferred against the decree of the Court of the District Munsiff (Principal) of Trichinopoly in Original Suit No. 408 of 1932.

A. V. Narayanaswami Aiyar for Appellants.

K. S. Desikan for Respondent.

The Court delivered the following

JUDGMENT.—This second appeal arises out of a suit on a promissory note. The promissory note was executed by the fourth and fifth defendants, the fourth defendant being the mother of defendants 1 to 3 and the fifth defendant their grandmother. The body of the note also mentions defendants 1, 2 and 3, who were all minors at the time, as parties to the note and the fourth defendant signed it on her own behalf and on behalf of the three minors. I may add that the fourth defendant had been appointed executrix of her mother-in-law's will whereby the mother-in-law had bequeathed substantial properties to her grandchildren the present 1 to 3 defendants. Ex. A accordingly recites that the fourth defendant joined in the note in the capacity of "guardian and mother of and executrix for Nos. 1 to 3". The purpose of the loan is stated to be "to meet the Court expenses of getting the probate through Court

* S. A. No. 91 of 1935. 23rd November, 1936.

Filix Joseph Sarpra-sadam v. Subramania Chettiar.

of the will in favour of the said minors and to meet the expenses of the family".

The plaintiff prayed for a decree directing defendants 4 and 5 to pay the amount due under the promissory note both personally and from out of the estate of the deceased grand-mother of defendants 1 to 3 which the fourth defendant was managing as executrix. The fifth defendant remained *ex parte* throughout. The fourth defendant was *ex parte* up to a late stage in the trial and then appeared by a vakil and sought to raise a contention that she had received no consideration under the promissory note and accordingly there should be no decree against her. Defendants 1 to 3 raised the contention that as their father was alive the mother was not their guardian, that the note was therefore not binding upon them, that in fact there was no consideration for the note and that even if money had been borrowed by the fourth defendant and the fifth defen-dant under the note, it could not be held to be binding upon the properties bequeathed to them under their grandmother's will because it was only a promissory note loan to defendants 4 and 5 on which the creditor was not entitled to direct recourse against the estate of the testatrix.

The first issue was raised in rather vague terms, *viz.*, whether the suit promissory note was true, valid and binding on defendants 1 to 3. It was rightly held by the District Munsiff that the fourth defendant was not the guardian of defendants 1 to 3 and these defendants could not accordingly be held to be parties to the promissory note. On the question of consideration, the District Munsiff held against defendants 4 and 5 and granted a personal decree against them; but as regards the claim against the estate in the hands of the third defendant as executrix, the District Munsiff followed the deci-sion in *Ammalu Ammal* v. *Namagiri Ammal*[1], *Chidambaram Pillai* v. *Veerappa Chettiar*[2] and *Srishchandra Nandi* v. *Sudhirkrishna Banerji*[3] and declined to grant a decree. He added that though the plaintiff might be entitled to be subro-gated to the fourth defendant's rights of indemnity if any from the estate, the plaint had not been framed on those lines.

On appeal the learned District Judge confirmed the finding of the Court below as to the factum of consideration. He also

1. (1917) 33 M.L.J. 631.
2. (1917) 6 L.W. 640.
3. (1931) I.L.R. 59 Cal. 216.

Filix Joseph Sarprasadam v. Subramania Chettiar.

held that the loan was borrowed for purposes binding on the estate obtained by the minors under the will of their grandmother, because according to the evidence he thought it must have been borrowed for expenses of the probate proceedings. He then referred to S. 321 of the Succession Act and construed it as declaring a charge in favour of the creditor who lends money to an executor for probate expenses. He accordingly passed a decree awarding to the plaintiff a charge upon the estate of the deceased testatrix in the hands of the fourth defendant, the executrix. Hence this appeal by defendants 1 to 3.

Before me the learned counsel for the appellants raised various questions, some of them questions of fact. At one time it seemed to me that there might be some ground for a suspicion that the suit promissory note might have been brought about by the husband of the fourth defendant for an amount due from himself under a prior decree in favour of the plaintiff. Indeed the written statement had gone the length of suggesting that at a time when the fourth defendant's husband was about to be arrested, the suit promissory note must have been brought into existence in substitution of his liability. It is regrettable that without an examination of the records of the suit in which the decree against the fourth defendant's husband had been passed a suggestion of that kind should have been made. An examination of the records relating to that suit has now shown that at or about this time there was in fact no application for the arrest of the fourth defendant's husband at all. That makes one very reluctant to attach any weight to the testimony of the fourth defendant. On the question of fact I see no reason to decline to accept the finding of the learned District Judge that money must have been borrowed under Ex. A as stated in the document.

As regards the purpose of the loan, Mr. Narayanaswamy Aiyar laid some stress on the fact that Ex. A itself recites that the money was borrowed not merely for probate expenses but also for the expenses of the family, and he argued that even S. 321 on which the learned District Judge relied would not apply to so much of the money as might have been applied to domestic expenses. In the view that I take of S. 321 it is not necessary for me to deal with this contention; but I must however remark that if really the money had been borrowed

Filix Joseph Sarprasadam v. Subramania Chettiar.

under Ex. A, as held by the learned District Judge, the persons who could have placed information before the Court as to the portion thereof spent for purposes other than probate expenses are the fourth and fifth defendants and the father of defendants 1 to 3. If the fourth defendant chooses to speak a falsehood and the other people do not choose to come forward to give evidence, I do not think the appellants can rely merely upon the doctrine of onus and say that the plaintiff has not discharged the onus lying upon him. I therefore deal with the case on the footing that as found by the learned District Judge money had been borrowed on the representation that it was required for expenses in connection with the probate proceedings. But I regret to hold that even on that state of facts, it is not possible to give the plaintiffs a decree against the interests derived by the minors under their grandmother's will.

Here again, I must notice a technical objection raised by the appellant's learned counsel, *viz.*, that the fourth defendant had not been impleaded in the appeal to the District Court nor the other beneficiaries under the will. These are no doubt curious omissions, but if I was otherwise prepared to uphold the plaintiff's claim, I should have even been prepared to take the necessary steps to implead the fourth defendant at least before me so as to represent the estate. It was apparently thought in the lower Court that as it was defendants 1 to 3 who took the objection that the plaintiff was not entitled to a decree against their interests under their grandmother's will it was sufficient to obtain a decree in the appellate Court against them and hence they alone were impleaded as parties to the appeal in the lower appellate Court.

Coming now to the main contention that a creditor who lends money on a promissory note executed by an executor is not entitled to direct recourse against the testator's estate, there can be very little doubt that that is the ordinary rule. It is sufficient to refer to the decisions already mentioned as relied on by the trial Court. The same reasoning has been adopted by a single Judge of the Rangoon High Court in *Mahanth Singh* v. *U Aye*[1]. The learned District Judge was apparently prepared to follow the same rule but for the interpretation that he placed upon S. 321 of the Succession Act. No case has been brought to my notice in which S. 321 has been construed in the way the

1. (1936) I.L.R. 14 Rang. 336.

learned District Judge has done. Nor has any decision of the English Courts been shown where moneys borrowed by an executor for items of the kind referred to in S. 319 or S. 320 have been held directly recoverable from the estate of the deceased. On the other hand Mr. Narayanaswami Aiyar contended with some justification that the decision in *Corner* v. *Shew*[1] so far as it relates to moneys borrowed by the executor for funeral expenses and the way that that case has been referred to in *Farhall* v. *Farhall*[2] support the contrary conclusion. A reading of Ss. 319 to 323 of the Succession Act will show that the purpose of these provisions is not the regulation of the rights of creditors against the estate of the testator but the regulation of claims of priorities *inter se* among various kinds of creditors. The provisions assume that a certain fund is available in the hands of the executor and then proceed to lay down in what order of priority that fund ought to be disbursed. S. 319 starts with laying down the duty of the executor to collect the assets due to the deceased; Ss. 320, 321 and 322 provide what payments should be made out of such assets in the first instance and S. 323 winds up with the provision that save as aforesaid no creditor shall have right of priority over another. It seems to me it will be a misreading of S. 321 to hold that it declares a charge on the estate as between the lender and those interested in the estate. In this view I must hold that the view taken by the learned District Judge that S. 321 justifies a different treatment of this case from the decisions already referred to is not correct.

As the plaintiff's suit must fail on the above ground, it is unnecessary to consider the objections raised by Mr. Narayanaswamy Aiyar as to the rate of interest provided for in Ex. A and allowed by the Courts below without any discussion as to whether borrowing at such a high rate was necessary or justified. Nor is it necessary for me to deal with his argument that in the circumstances of the case, the lower Court should have directed the costs of the appellants before it, even if he was entitled to a decree, to come out of the estate and not to be paid by the present appellants personally. Seeing that two at least of the present appellants are minors, it is not unlikely as Mr. Narayanaswami Aiyar suggests that the learned District

1. (1838) 3 M. & W. 350: 150 E. R. 1179.
2. (1871) 7 Ch. A. 123.

Filix Joseph Sarpra-sadam v. Subramania Chettiar.

Judge himself did not intend to give a personal decree but it is unnecessary for me to say more about it.

On behalf of the respondent, Mr. Desikan asks that his clients may at least be allowed the benefit of the indemnity to which according to the cases the executrix will be entitled from the estate if it is shown that the money had been applied for purposes necessary for or beneficial to the estate. Whether the pleadings justify the consideration of this question has often been the subject of difference of opinion. Even putting a very liberal construction on the plaint in the present case, I am sorry to find that this aspect of the matter never seems to have occurred to the plaintiff's advisers. Even after the appellants had taken the objection that the plaintiff was not entitled to a decree against the estate and even at a time when the plaintiff did apply for some amendment of the plaint he did not think fit to ask for alternative relief on the footing of his right to avail himself of the right of indemnity. Whether such a right can be availed of by him in other appropriate proceedings it is not for me to say. I regret to say that I am unable to allow this suit to be converted into one in which that claim can be made.

The result is that the second appeal must be allowed and the decree of the trial Court restored. On the question of costs, I am not prepared to allow the appellants to take shelter under the usual suggestion that the onus was on the plaintiff and that they were at liberty to put forward any false story as regards consideration. The suggestion that the promissory note was taken under a kind of duress against the appellant's father was absolutely uncalled for. I however do not wish to interfere with the first Court's direction as to costs; but I propose to direct that both in the lower appellate Court and in this Court, the parties should bear their respective costs.

Leave granted.

S. V. V. *Appeal allowed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATASUBBA RAO, MR. JUSTICE CORNISH AND MR. JUSTICE VENKATARAMANA RAO.

P. P. P. Chidambara Nadar .. *Appellant** (*Petitioner-Plaintiff*)

v.

C. P. A. Rama Nadar (deceased), Pichaimani *alias* Arunachalam (minor) by guardian Thillai Ammal as L. R. of the deceased first Respondent (*Vide* Order dated 10th September, 1934) on C. M. P. No. 3546 of 1934) and others .. *Respondents* (*Respondent, 8th Defendant and his L. Rs.*).

F.B.
Chidambara Nadar
v.
Rama Nadar.

Limitation Act (IX of 1908), S. 182 (2) and (5)—Word 'appeal' whether includes 'revision'—Final order in Art. 182 (5) whether would comprehend mere rejection of an execution application—Legal representative of one of the defendants not brought on record properly in execution application—Whether application defective and not in accordance with law—Application against other defendants would save limitation in regard to the legal representative of one of them also.

A decree was passed on the 24th November, 1924. A revision was filed in the High Court against it which was dismissed on 3rd November, 1927. An execution petition was put in on 24th June, 1929, which was rejected on 18th November, 1929. Another petition was put in on 16th November, 1932. On the question whether Art. 182 (2) of the Limitation Act applies to Civil Revision Petitions as well, or only to appeals in the narrower sense of that term as used in the Code of Civil Procedure.

Held by the Full Bench that Art. 182 (2) includes Civil Revision Petitions as well and hence the execution application was quite within time.

Subramania Pillai v. *Seethai Ammal*, (1911) 24 M.L.J. 457: I.L.R. 36 Mad. 135, overruled.

Nagendranath De v. *Sureshchandra De*, (1932) 63 M.L.J. 329: L.R. 59 I.A. 283: I.L.R. 60 Cal. 1 at 5 (P.C.), referred to.

There is no essential difference between a remedy by way of appeal and by way of revision.

Nagendranath De v. *Sureshchandra De*, (1932) 63 M.L.J. 329: L.R. 59 I.A. 283: I.L.R. 60 Cal. 1 at 5 (P.C.), relied on.

In spite of the word 'appeal' having a narrower meaning in Arts. 150 and 157 of the Limitation Act, still as a canon of construction, though ordinarily the same meaning should be given to the same words occurring in different parts of the same Act, it is recognised that if sufficient reasons exist, a word

---

* C. M. A. No. 295 of 1933. 6th November, 1936.

F.B.

Chidambara Nadar v. Ramâ Nadar.

can be construed in one part of an Act in a different sense from that it bears in another.

On the question whether the application dated 24th June, 1929, itself was not in accordance with law and whether there was no final order within the meaning of Art. 182 (5).

Held by *Pandrang Row* and *Venkataramana Rao, JJ.*—(1) That the only defect that could be alleged in this application was that in the appropriate column the name of the eighth defendant was not mentioned as the legal representative of the defendants 1 and 6. All that would be necessary for a valid execution petition against the legal representative was that the execution should have prayed for execution against a person as the legal representative of another.

It is not every defective application that can be said to be not in accordance with law.

Abdul Kharim Saheb v. *Lakshmanaswami*, (1927) 27 L.W. 475, followed.

(2) That applying the principle of *Pattannayya* v. *Pattayya*, (1925) 50 M.L.J. 215, even assuming that no relief was sought against the eighth defendant as the legal representative of the first defendant, the application of 24th June, 1929, would nevertheless be an application in accordance with law and save limitation against him, because the application was for execution of a joint decree in regard to all the defendants, though some other reliefs had been decreed separately against them.

(3) That an order would be a final order within the meaning of Art. 182 (5) if it terminated the execution proceedings, so far as the Court passing it was concerned. What happened here was that the Court rejected it thus terminating the proceeding; therefore the rejection was certainly a final order.

Kesavuloo v. *The Official Receiver, West Tanjore*, (1936) 71 M.L.J. 336, distinguished.

Mottaya Padayachi v. *Rajagopalan*, (1936) M.W.N. 547 at 548, relied on.

Per *Pandrang Row, J.*—There is no reason why the substitution of the word 'rejected' for 'dismissed' should make any difference in deciding whether the order is final or not.

Appeal against the order of the Court of the Subordinate Judge of Madura dated 9th February, 1933, and made in E.P. No. 322 of 1932 in O.S. No. 71 of 1920 First Additional Sub-Court, Madura.

B. Sitarama Row and *P. N. Appuswami Aiyar* for Petitioner.

K. V. Srinivasa Aiyar for Respondents.

The Court (*Stone* and *Pandrang Row, JJ.*) made the following

ORDER.—This appeal against an order of the Additional Subordinate Judge of Madura made in an execution petition raises a point of some little difficulty which can be expressed as follows:—

A decree was passed on the 24th November, 1924, in O.S. No. 71 of 1920 on the file of the First Additional Subordinate

F.B.

Chidambara Nadar v. Rama Nadar.

Judge of Madura. Later on a revision petition was put in the High Court and that revision petition was dismissed on the 3rd November, 1927. An execution petition was put in on the 24th June, 1929, which was rejected on 18th November, 1929, and it was admittedly within time if Art. 182 (2) of the Limitation Act applied. There was another execution petition on the 26th September, 1929, with which we are not concerned. The present petition, in respect of which this appeal is filed, was filed on the 16th November, 1932. If the earlier petition filed on 24th June, 1929 and rejected on 18th November, 1929, was in time—and it would admittedly be in time if the revision petition falls under Art. 182 (2) of the Limitation Act—the present petition would be in time.

Art. 182 (2) is in the following words:

" (Where there has been an appeal) the date of the final decree or order of the appellate Court, or the withdrawal of the appeal".

The starting point where there has been an appeal, is the date of the final decree or the order of the Appellate Court or the withdrawal of the appeal.

It was decided by a Bench of this Court in *Subramania Pillai* v. *Seethai Ammal*[1] that the word "appeal" referred in Art. 182 (2) of the Limitation Act does not include a revision under S. 115 of the Code of Civil Procedure or under S. 25 of the Provincial Small Cause Courts Act or even under the Charter Act. That case so far as we can see is absolutely on all fours with this case and it is that decision that raises the doubt that we feel in this matter and out of respect for the learned Judges who decided that case, we think it necessary to refer this point to a Full Bench in order to set at rest this important point. We feel a difficulty in following that case because, *inter alia* the Privy Council in *Nagendranath De* v. *Sureshchandra De*[2] in a matter under Art. 182 (2) of the Limitation Act, made the following observations:

"There is no definition of 'appeal' in the Code of Civil Procedure, but their Lordships have no doubt that any application by a party to an appellate Court, asking it to set aside or revise a decision of a Subordinate Court, is an appeal within the ordinary acceptation of the term, and that it is no less an appeal because it is irregular or incompetent".

A Bench of this High Court in *Subramania Pillai* v. *Seethai Ammal*[1], already referred to, arrived at the conclusion

1. (1911) 24 M.L.J. 457: I.L.R. 36 Mad. 135.
2. (1932) 63 M.L.J. 329: L.R. 59 I.A. 283: I.L.R. 60 Cal. 1 at 5 (P.C.).

F.B.

Chidambara Nadar v. Rama Nadar.

they did, because they were of opinion that the word 'appeal' was not used in a more extended sense in Art. 182 than it was in Arts. 150 to 157 and that because in these latter articles distinctions were made between suits, appeals and applications, it could not be contended that an appeal would include a revision petition. We apprehend that the learned Judges were there saying in fact that as it is quite clear that under the Code of Civil Procedure a revision petition and an appeal are not the same thing—as under S. 115 of the Code of Civil Procedure a revision petition only lies where an appeal does not lie—and as in Arts. 150 to 157 under the heading 'appeals' under the Civil Procedure Code, the Limitation Act deals with appeals in the same sense as it is used in the Code of Civil Procedure, therefore it must be assumed that in Art. 182 (2) where the word 'appeal' is used *simpliciter*, it must be given the same meaning as is given in Arts. 150 to 157.

In the passage cited from the judgment of the Judicial Committee it is equally plain that the Judicial Committee regarded an application by way of revision as an appeal in the ordinary acceptation of the term. We feel that it is reasonably plain, bearing in mind the wording of S. 115 of the Code of Civil Procedure, that a distinction for the purpose of the Code is drawn between a revision petition and an appeal, for it is there stated that a revision petition only lies where an appeal does not lie. The judgment of the Judicial Committee indicates that the word 'appeal' has a wider meaning in Art. 182 than it bears in the Code of Civil Procedure.

And the same broad view of the meaning of the term 'appeal' seems to have been taken by their Lordships in *Rex* v. *Nat Bell Liquors, Ltd.*[1], though they were not dealing with a revision petition under the Indian Procedure but with an appeal from a Provincial High Court to the Supreme Court of Canada upon a motion for a writ of *certiorari*.

The Secretary of State for India in Council v. *British India Steam Navigation, Co.*[2], also in our opinion points the same way.

It may be material to bear in mind the various cases *Chappan* v. *Moidin Kutti*[3], *Venkatrangayya Appa Row* v.

1. (1922) 2 A.C. 128. 2. (1911) 13 C.L.J. 90 at 93, 94.
3. (1898) 8 M.L.J. 231 : I.L.R. 22 Mad. 68 at 80 (F.B.).

F.B.

Chidambara Nadar v. Rama Nadar.

Murala Sriramulu[1] and *Siddalingana Gowd* v. *Bhimana Gowd*[2], where it has been held that a Court hearing a revision petition is acting as an appellate court.

In *Rajah of Ramnad* v. *Khamid Rowthen*[3], Lord Dunedin made the following observations:

"From this judgment an appeal in the form appropriate to such a case from the Munsif's Court, *i.e.*, Civil Revision Petition, was preferred".

That is an observation made in the course of a case in which a revision petition was treated as an appeal in the ordinary acceptation of the term.

It is further in our opinion a matter to be borne in mind that the clauses in the Limitation Act relating to applications do not apply to revisions according to the wording of Art. 182. See *Muthu Chettiar* v. *Narayanan Chettiar*[4].

One is faced with the further difficulty:—If a revision petition is not an appeal for purposes of Art. 182 (2) the following position arises. The period of limitation is entirely different accordingly as the revision petition succeeds or fails. If it succeeds the result would be that there would be a review of judgment or the decree would be amended and where that is the case Art. 182 (3) or (4) would presumably apply. If it fails we think there is a *casus omissus* because the revision petition could not be construed as an application within the meaning of Art. 182 and cls. 3 and 4 will not apply. Cl. 2 will not apply because it is not an appeal. This seems to be a very unfortunate state of affairs which would leave the party affected in complete uncertainty until the revision petition is disposed of.

In these circumstances as the matter is one of some general importance and as *Subramania Pillai* v. *Seethai Ammal*[5] has decided a case absolutely on all fours with the present case and as the Bench is one for which we have the greatest respect, we think it would be better to have this matter set at rest by a Full Bench rather than have conflicting decisions.

The question referred is:

"Whether Art. 182 (2) of the Limitation Act applies to Civil Revision Petitions as well or only to appeals in the narrower sense of that term as used in the Code of Civil Procedure".

1. (1912) 17 I.C. 593.
2. (1934) 68 M.L.J. 487.
3. (1926) 50 M.L.J. 503: L.R. 53 I.A. 74: I.L.R. 49 Mad. 335 at 339 (P.C.).
4. (1927) 55 M.L.J. 274: I.L.R. 51 Mad. 672.
5. (1911) 24 M.L.J. 457: I.L.R. 36 Mad. 135.

F.B.

Chidambara Nadar v. Rama Nadar.

Venkatasubba Rao, J.

B. Sitarama Rao and *P. N. Appuswami Aiyar* for Appellant.

K. V. Srinivasa Aiyar for 2 to 4 Respondents.

The Court (*Venkatasubba Rao, Cornish* and *Venkataramana Rao, JJ.*) expressed the following

OPINION. *Venkatasubba Rao, J.*—The facts have been fully set forth in the order of referring Judges and need not be recapitulated. The short question is, whether when a revision petition is filed, it is permissible to hold under Art. 182 (2) of the Limitation Act, that the date of the order in revision made by the High Court furnishes the starting point; in other words, whether the term 'appeal' is used in a restrictive sense so as to exclude revision petitions and the expression 'the Appellate Court' is to be confined to a Court exercising appellate, as opposed to, revisional powers. The only considered decision directly bearing on the point is *Subramania Pillai* v. *Seethai Ammal*[1], which places a restrictive interpretation upon the word 'appeal'; but as the learned Judges who have referred the question, rightly point out, that decision is inconsistent with the views expressed in numerous authoritative decisions as to the true meaning of the terms 'appeal' and "appellate Court".

The view taken by the learned Judges in *Subramania Pillai* v. *Seethai Ammal*[1], necessitated, if we may say so with respect, their adopting a somewhat curious line of reasoning. They were faced with the difficulty, what should be the starting point when the revision petition fails; and what, when it succeeds? Logically, from their conclusion that the word 'appeal' does not include 'revision' in neither event should an order upon a revision petition give rise to a fresh starting point. But they were driven to hold that when the revision petition is dismissed, time runs from the original decree or order but when it succeeds, not from the original, but from the fresh decree or order, either under cl. (1) or cl. (4). This involves a certain contradiction, as the learned Judges felt compelled to have recourse to the same clause, for two dissimilar purposes; when the revision petition is dismissed, time would run from the original decree or order under cl. (1); when it is allowed, under the same

1. (1911) 24 M.L.J. 457: I L.R. 36 Mad. 135.

F.B.

Chidambara Nadar v. Rama Nadar.

Venkatasubba Rao, J.

clause, from the fresh decree or order. Moreover, by a sort of fiction, the learned Judges held that where the original order is modified as is sometimes done in revision, it must be treated as having been amended, with the result that cl. (4) is brought into play. It seems in our opinion somewhat artificial to hold, that modifying an order in revision amounts to amending it, when, as is well known in our processual law, the word 'amendment' does not embrace, correction by a superior Court. There is yet a further difficulty revealed by the judgment of Wallis, J., as he then was, his decision being the one that was upheld in *Subramania Pillai* v. *Seethai Ammal*[1]. He is constrained to hold that a revision petition may furnish not only two but three starting points, all of them falling under cl. (1):

"(1) Where it is simply dismissed, time runs from the date of the original decree;

(2) Where it is dismissed with costs, from the date of the original decree so far as that decree is concerned and from the date of the order of the High Court, so far as it relates to costs;

(3) Where the decree is modified in revision, from the date of the decree as modified."

It seems to us that such a straining of words as has led to these contradictory and inconsistent results must if possible be avoided.

In *Chappan* v. *Moidin Kutti*[2] six learned Judges had to consider the question whether under cl. (15) of the Letters Patent as it stood before the amendment of 1919, an appeal lay from the judgment of a single Judge passed in the exercise of revisional jurisdiction. Cl. (15) enacted that an appeal lay to the High Court from the judgment of one Judge of the High Court or one Judge of a Division Court *pursuant to S. 13 of the Charter Act.* Now turning to the last mentioned section, it provided for the exercise by the Judges of the High Court, of the original and appellate jurisdictions vested in that Court. This raised the question whether revisional jurisdiction was comprised within the term 'appellate jurisdiction' as used in S. 13, for, if it did not, no appeal would lie under cl. 15 of the Letters Patent. It was held by a majority of the Judges that an appeal did lie, provided the order amounted to a 'judgment'. Subramania Aiyar, J., in the course of his judgment points out what the true meaning of the expression 'appellate jurisdiction' is. That may be exercised in a variety of forms and may be

1. (1911) 24 M.L.J. 457: I.L.R. 36 Mad. 135.
2. (1898) 8 M.L.J. 231: I.L.R. 22 Mad. 68 (F.B.).

F.B.

Chidambara Nadar *v.* Rama Nadar.

Venkatasubba Rao, J.

invoked sometimes as a matter of right and sometimes subject only to certain specified conditions or limitations, such, for instance, as those prescribed in the provision in the Code relating to the revisional powers of the High Court; but as Subramania Aiyar, J., goes on to observe, no such limitation, however much it may circumscribe the exercise of the power, touches the intrinsic quality of the power itself (p. 81).

The wording of *cl. 39* of the *Letters Patent* has given rise to a similar question. It enacts that an appeal lies to the Privy Council from a final judgment or order passed by the High Court *on appeal,* and that led to the question whether an order made by the High Court in the exercise of its revisional jurisdiction or powers of superintendence, came within the purview of that clause. Mookerjee and Cox, JJ., held in *Secretary of State for India in Council* v. *British India Steam Navigation Company*[1] that such an order, though made in revision, is appealable as there is no ground for construing the word 'appeal' used in cl. 39 in a narrow sense. Mookerjee, J., after referring to various authorities, quotes Lord Westbury in *Attorney-General* v. *Sillem*[2] who observes that the right of appeal is the right of entering a superior Court and invoking its aid and interposition to redress the error of the Court below. The learned Judge also points out, after referring to *Story's Constitution* (Vol. II, Ss. 1760 to 1766), that the characteristic of an appeal is the revision of the judicial proceeding of an inferior Court, so that the mode in which that power is exercised is wholly immaterial (p. 94).

That a remedy by way of revision does not differ in essence from a right of appeal (the only difference being in the mode in which the power is exercised), has often been declared by the Judicial Committee. In *Rajah of Ramnad* v. *Khamid Rowthen*[3] their Lordships referring to a Civil Revision Petition thus observe:

> " From this judgment an appeal in the form appropriate to such a case from the Munsif's Court—*i.e.*, a Civil Revision Petition—was preferred to the High Court of Madras."

See also *Baijnath Sahai* v. *Ramgut Singh*[4]. In *Nagendranath De* v. *Sureshchandra De*[5] the question as to what

---

1. (1911) 13 C.L.J. 90.
2. (1864) 10 H.L.C. 704.
3. (1926) 50 M.L.J. 503: L.R. 53 I.A. 74 at 77: I.L.R. 49 Mad. 335 (P.C.),
4. (1896) L.R. 23 I.A. 45: I.L.R. 23 Cal. 775 at 784 (P.C.).
5. (1932) 63 M.L.J. 329: L.R. 59 I.A. 283: I.L.R. 60 Cal. 1 (P. C.).

amounted to an appeal under Art. 182 (2) arose, and the language of their Lordships in view of the present question raised, though it does not directly bear upon it, is both suggestive and significant. The facts of that case are somewhat complicated, but for the present purpose it is sufficient to state, that there were two sets of mortgagees—the appellants on the one hand and Madan Mohan and his son, described as respondents Nos. 24 and 27, on the other. As between them there was a dispute in regard to a sum of Rs. 4,467 and that was decided in favour of the appellants. Madan Mohan, as one of the decree-holders, applied for a final mortgage decree and in doing so, he again claimed as against the appellants, his co-decree-holders, the sum which had already been disallowed. The Subordinate Judge on the 24th June, 1920, delivered his judgment, again negativing Madan Mohan's claim and passed a final decree for the sale of the mortgaged properties. The decree was drawn up on the 2nd August, 1920, but properly dated as of the 24th June. On the 27th August, 1920, Madan Mohan presented an appeal to the High Court, not from the decrees of the Subordinate Judge, which in truth it was, but from what was wrongly alleged to be an order made on the 24th June. As his objection was only to the decision, in so far as it related to his claim against the other decree-holders, he joined them alone as parties to the appeal and not the judgment-debtors. The appeal, though irregular in form, as not being an appeal against the decree of the Subordinate Judge, and though insufficiently stamped, was admitted and heard by the Court, and in the result, it was dismissed, both on the ground of irregularity and upon the merits, and the dismissal was embodied in the decree of the High Court dated the 24th August, 1922. The appellants on the 3rd October, 1923, presented an application for execution of the decree against the judgment-debtors. It was contended for the latter that the three years were to be calculated from the 24th June, 1920, in which case the application would be manifestly out of time; it would, on the other hand, be within time if the critical date was that of the decree of the High Court of the 24th August, 1922; and the decision of the question depended upon, whether Madan Mohan's appeal, which was dismissed on the latter date, was an appeal within the meaning of Art. 182 (2). Their Lordships held that any application by a party to an appellate Court to set aside or revise a decree or order of a Court

F.B.

Chidambara Nadar v. Rama Nadar.

Venkatasubba Rao, J.

Subordinate thereto is an "appeal" within the meaning of that provision, even though—

(a) it is irregular or incompetent, or

(b) the person affected by the application to execute were not parties, or

(c) it did not imperil the whole decree or order.

It is only the first of these three points that is now material and it is with the words used by their Lordships in this connection that we are here concerned. "There is no definition of 'appeal' in the Code of Civil Procedure," they observe:

> "But their Lordships have no doubt that any application by a party to an appellate Court, asking it to set aside or revise a decision of a Subordinate Court, is an appeal within the ordinary acceptation of that term and that it is no less an appeal because it is irregular or incompetent."

True, much importance cannot be attached to the word "revise" in this passage, as their Lordships were not adverting to what is technically known as a revision petition; but the view that there is no essential difference between a remedy by way of appeal and by way of revision, is considerably reinforced by the passage in question and its value becomes all the greater when we bear in mind that their Lordships made these observations in construing the very provision with which we are now concerned.

The only serious objection urged against this view is, that in one and the same Act the same word ought not to be construed in two different senses and that as the word "appeal" has a narrower meaning in Arts. 150 to 157, it would be wrong to give it an extended sense in Art. 182. But as a canon of construction, though ordinarily the same meaning should be given to the same words occurring in different parts of the same Act, it is recognised that if sufficient reasons exist, a word can be construed in one part of an Act in a different sense from that it bears in another part (Craies's Statute Law, IVth Edn., p. 153). We think we have shown that cogent reasons exist in the present case and what is more, the word 'appeal' within the ordinary acceptation of that term bears not the narrower but the extended meaning.

Our answer to the question referred is therefore in the affirmative.

F.B.

Chidambara Nadar *v.* Rama Nadar.

Venkataramana Rao, J.

This appeal coming on for final hearing after the expressing of the opinion of the Full Bench, the Court (*Venkataramana Rao* and *Pandrang Row, JJ.*) delivered the following

JUDGMENTS. *Venkataramana Rao, J.*—The question in this case is whether the execution application dated 16th November, 1932, filed by the plaintiff is barred by limitation. For the disposal of the same, a few dates of the prior proceedings may be relevant. They are 24th November, 1924, the date of the decree, 24th June, 1929, the date of the application for execution, 3rd November, 1927, the date of the order of the High Court dismissing the revision petition presented against the decree and 16th November, 1932, the date of the present application for execution. When this matter came up on a prior occasion for hearing before Stone, J., and my learned brother, the question was whether the starting point for the execution of the decree would be the date of the dismissal of the revision petition in the High Court. *Subramania Pillai* v. *Seethai Ammal*[1] held that it would not. As a doubt was felt as to the correctness of that decision, the matter was referred to a Full Bench. The Full Bench has now decided that the term 'appeal' under Art. 182, cl. 2 of the Limitation Act would include revision and therefore the order dismissing the revision petition would be the final order within the meaning of that article. In the order of reference the learned Judges observed that if the application dated 24th June, 1929, was in time, the present application would be in time. From the order it would mean that the only question that was raised and argued before the division bench was that if the starting point for limitation would be the date of the dismissal of the revision petition, there will be no question of limitation. But Mr. Srinivasa Aiyar now contends that he had no opportunity on the prior occasion to contend that the application dated 24th June, 1929, would not save limitation even it be held that under Art. 182 (2) of the Limitation Act the term 'appeal' would include revision. He is now permitted to argue that question subject to his filing an affidavit to the effect that he had not the said opportunity on the prior occasion. He has now raised two questions, namely, (1) the application dated 24th June, 1929, is not in accordance with law, and (2) there was no final order within

1. (1911) 24 M.L.J. 457: I.L.R. 36 Mad. 135.

F.B.

Chidambara Nadar v. Rama Nadar.

Venkataramana Rao, J.

the meaning of Art. 182, cl. 5 and therefore the present application would be barred by limitation in any event.

The contention regarding the first point is put thus. The present execution application is to recover a sum of Rs. 1,400 and odd from the 8th defendant as the legal representative of the first defendant against whom there was a decree for the said sum solely. On the date of the prior execution application dated 24th June, 1929, the first defendant was dead; the sixth defendant who was recognised as his legal representative was also dead; the eighth defendant was not brought on record as the legal representative of defendants 1 and 6 and there was no application for execution against him in respect of the sum now sought to be recovered; thus the application would not be in accordance with law within the meaning of Art. 182, cl. 5 of the Limitation Act. It seems to me that this contention is untenable. Looking into the execution application it will be seen that in the cause title against the name of the first defendant it is stated that he was dead. A similar entry is made against the name of the sixth defendant and at the end of the array of the defendants, the following note is added that the legal representative of defendants 1 and 6 is Rama Nadar, thus indicating that Rama Nadar is sought to be added as the legal representative of defendants 1 and 6. Then, turning to the column 'Name of the judgment-debtor against whom the decree is to be executed', it is stated 'C.P.A. Palanikumara Nadar and others'; 'and others' would certainly include Rama Nadar. Therefore the application is in substance one to have the decree executed also against the legal representative of the first defendant and the sixth defendant. The law does not require an application to bring on record a person as the legal representative of a defendant. All that is necessary for a valid execution petition against the legal representative is that the execution application must pray for execution against a person as the legal representative of another. That in my opinion is complied with in the present application. It is not every defective application that can be said to be an application not in accordance with law. The only defect that can be alleged in this application is that in the appropriate column Rama Nadar was not mentioned as the legal representative. It was laid down in *Abdul Karim Sahib* v. *Lakshmanaswami*[1]

1. (1927) 27 L.W. 475.

F.B.
Chidambara Nadar v. Rama Nadar.
Venkataramana Rao, J.

that an application which contains defects such as these cannot be said to be an application not in accordance with law. The decree, it will be noticed, is a joint decree within the meaning of the explanation to Art. 182 of the Limitation Act. The decree provides that in respect of outstandings all the partners should collect the amounts and the amount should be distributed between them. In addition to this there is a decree for a specified sum against the first defendant. In *Pattannayya* v. *Pattayya*[1] it was held that a decree is a joint decree if any one of the reliefs given in the decree is against the defendants jointly, even though some other reliefs may be given against the defendants separately, so that if in respect of the joint relief an application for execution is made against one of them, it will save limitation in regard to the other defendants even in respect of the reliefs which have been decreed against solely. If the principle of that decision is to be applied to this case, even assuming that no relief was sought against the eighth defendant as the legal representative of the first defendant, the application of 24th June, 1929, would nevertheless be an application in accordance with law and save limitation.

The next question is whether there is a final order within the meaning of Art. 182 of the Limitation Act, because under the amended article it is not the date of the execution application that saves limitation but the final order thereon. Mr. Srinivasa Aiyar contends that there is not, relying very strongly on a recent decision reported in *Kesavuloo* v. *The Official Receiver, West Tanjore*[2]. In that case the actual decision was that an order returning an execution application would not be a final order even in cases where the application is not represented. I may notice that there is also authority for the view that it would be—*vide* the judgment of my learned brother reported in *Mottayya Padayachi* v. *Rajagopalan*[3] and also of Stodart, J., in the same volume at p. 547. It is unnecessary to express my opinion on this question, whether the order returning an execution application in cases where it is not represented would be a final order, because it is unnecessary for the disposal of this case. In my opinion an order would be a final order within the meaning of the clause if it terminates the execution proceeding so far as the Court passing it is concerned. The

1. (1925) 50 M.L.J. 215.
2. (1936) 71 M.L.J. 336.
3. (1936) M.W.N. 547 at 548.

F.B. — Chidambara Nadar *v.* Rama Nadar. — Venkataramana Rao, J.

order need not be one on the merits. I agree with my learned brother when he says:

"I do not think it can be contended reasonably that the legislature intended that where the Court chose to pass certain orders which were not final in the sense that they did not deal with the merits of the application it was to be held that there was no final order within the meaning of the amended article". (*Mottayya Padayachi* v. *Rajagopalan*[1].)

There is nothing in the decision in *Kesavuloo* v. *The Official Receiver, West Tanjore*[2] which runs counter to this view. In fact, Venkatasubba Rao, J., at p. 341, observes:

"The words 'final order' imply that the proceeding has terminated so far as the Court passing it is concerned."

He cites with approval the decision in *Kadiresan* v. *Maung San Ya*[3] where it was held that an order made on an execution application closing the case for want of non-compliance with certain requirements would be final. In that case it was closed at the request of the party. What happened in this case was that the Court rejected it thus terminating the proceeding. Therefore the order of rejection in this case would be a final order within the meaning of Art. 182, cl. 5 of the Limitation Act and therefore the present application is not barred by limitation. We therefore reverse the decision of the lower Court and remand the case for disposal in accordance with law.

Pandrang Row, J.

Pandrang Row, J.—I agree and I wish to say a few words. When the matter originally came up before Stone, J., as he then was and myself it appears to have been admitted clearly that if the petition presented in June, 1929, was in time, there was nothing else to be done but to allow the appeal and remand the petition for disposal. If certainly the points that are now raised and which have been dealt with by my learned brother had then been raised before us, it is difficult to believe that we would have troubled the Full Bench for an opinion before deciding the points now raised by the respondents. The respondents' Advocate however assures us that it was not that he raised these points but that he had no opportunity to raise them. If this means that he was not called upon at all, it is not supported by the preamble to the order of reference which shows that he was heard. What exactly the learned Advocate means I am unable to say; but as he has given us the assurance that he would undertake to file an affidavit in support of what

1. (1936) M.W.N. 547 at 548. 2. (1936) 71 M.L.J. 336.
3. A.I.R. 1933 Rang. 87.

F. B.

Chidambara Nadar v. Rama Nadar.

Pandrang Row, J.

he has said and in view of the fact that the questions raised are questions of law, we have thought it desirable in the interests of justice to allow the points to be raised and decided instead of refusing him any opportunity to raise them.

As regards the question whether the execution petition filed in June, 1929, is in accordance with law, I have nothing to add to what my learned brother has said. As regards the other point whether the order thereon dated 18th November, 1929, is a final order, the respondents' Advocate relies upon a recent decision of a Bench reported in *Kesavuloo* v. *The Official Receiver, West Tanjore*[1]. Indeed, it was hinted by Mr. Sitarama Rao that it was this subsequent decision which was pronounced after we made the order of reference that is responsible for the raising of the points at present. That decision no doubt supports in some respects the argument of the respondent's Advocate. Apart from this, I have given my anxious consideration to that decision because that decision purports to disapprove of my decision in *Mottayya Padayachi* v. *Rajagopalan*[2]. It is with unfeigned sorrow that I express my inability to change my opinion on the point. I do not wish to say anything more on this subject because my learned brother is prepared to base his decision, with which I agree, on what I would call the narrow ground that the order in that case was of a different tenor from the order in the present case and also that there are certain observations in that decision which are themselves sufficient to our present conclusion. In fact, in that bench decision there are two definitions—a positive and a negative definition—of a final order. At p. 359 it is stated that:

> "When an order is made returning a petition, it does not deal judicially with the matter of the petition and cannot, therefore, be regarded as final."

The other definition is given at p. 341 thus:

> "The words 'final order' imply that the proceeding has terminated so far as the Court passing it is concerned."

This latter definition is sufficient to conclude the point raised in this case against the respondents. I have looked into the decisions of the Judicial Committee relied upon in *Kesavuloo* v. *The Official Receiver, West Tanjore*[1]. I do not think they decide the present question. They deal with the

---

1. (1936) 71 M.L.J. 336.
2. (1936) M.W.N. 547.

F.B.
Chidambara Nadar v. Rama Nadar.
Pandrang Row, J.

question as to what is a final order or decree in an appeal within the meaning of Art. 182, cl. 2, and it was held that where an appeal fails by reason of the non-compliance of the rules of procedure prescribed or is dismissed for want of prosecution, there is no order or decree of the appellate Court in which the decree of the Court below is merged and that all that remains is only the decree of the Court from which the appeal is preferred. In the present case, we are dealing with an order which rejected the execution application. That order of rejection certainly put an end to the petition so far as the Court is concerned. It was conceded before us by the Advocate for the respondents that if a petition is dismissed because it is not pressed, it would be a final order. I do not see why the substitution of the word 'rejected' for 'dismissed' should make any difference in deciding whether the order is final or not. Similarly, if an execution petition is dismissed for default, it would also be a final order. On the other hand, if the other definition is strictly applied, it may be contended that there was no judicial determination of the matter involved in the application and therefore there was no final order. I am unable to accept this as a correct interpretation of the words 'final order' found in Art. 182 (5) of the Limitation Act. In innumerable cases execution petitions are dismissed or struck off either for default or for failure to take steps, and it has never been contended that there is in such cases no final order which alone will provide a fresh starting point for limitation. I concur in the view expressed by my learned brother that in this case there was a final order, and that order being one dated 18th November, 1929, the subsequent petition filed in 1932 was in time. That petition must therefore be remanded to the Court below for disposal according to law.

We think in the circumstances of this case, and especially in view of the fact that this case necessitated a reference to a Full Bench and an argument before the Full Bench and a further argument after the Full Bench opinion was delivered, that a special fee should be allowed in this appeal. The Advocate's fee is fixed at Rs. 150. The contesting respondents 2 to 4 must pay the costs of the appellant in this appeal and bear their own costs. Their costs in the Court below will be within the discretion of the Court below.

K. C. ——— *Petition remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VARADACHARIAR.

The Firm of Ayili Mallappa Sanna Jembappa by partner Bharmappa .. *Appellant** (*Plaintiff*)

v.

Parasetti Sidramappa and another .. *Respondents* (*Defendants 2 and 1*).

Firm of Ayili Mallappa *v.* Parasetti Sidramappa.

Civil Procedure Code (V of 1908), O. 34, r. 14—Surety for the amount under a mortgage—Plaint giving up the mortgage and claiming money on simple money bond—Whether surety discharged under the circumstances—Whether S. 141, Indian Contract Act, prevented mortgagee from enforcing his right against surety—Right of mortgage could not be extinguished without a registered document—Registration Act (XVI of 1908), S. 17 1 (b).

A suit arose out of a claim against the principal debtor and his surety under a mortgage bond executed by the principal debtor. The second defendant who was the surety claimed to have been exonerated from all liability by reason of the plaintiff having given up his rights under the mortgage. He relied on the words appearing in the plaint to the following effect, "the plaintiffs have given up only the mortgage right and filed the suit on a simple bond".

Held, that having regard to r. 14, O. 34, Civil Procedure Code, the plaintiff could bring the property to sale and there would be nothing to preclude him from assigning the mortgage right to the surety as per terms of the surety bond or to preclude the surety from enforcing the mortgage right by reason of the provisions of S. 141 of the Contract Act which would entitle him by way of subrogation to the benefit of the securities held by the principal creditor.

Since it was nowhere suggested that there had been any other act of relinquishment, oral or documentary, except such as might arise from the statement contained in the plaint, the statement in the plaint could be reasonably construed only as a statement of the intention not to claim relief by way of sale.

(2) The mortgage right could not be held to have been extinguished, because there was no registered document as necessary under S. 17 (1) (*b*) of the Registration Act.

Appeal against the decree of the District Court of Bellary in A. S. No. 107 of 1930 preferred against the decree of the Court of the District Munsif of Hospet in O. S. No. 572 of 1929.

B. Sitarama Rao for Appellant.

V. S. Narasimhachar for Respondents.

The Court delivered the following

JUDGMENT.—This second appeal arises out of an action instituted against a principal debtor and his surety. The debt was due by the first defendant under a mortgage bond executed

* S. A. No. 64 of 1933. 24th November, 1936.

Firm of Ayili Mallappa *v.* Parasetti Sidramappa.

by him; and the second defendant had made himself liable for the sum as surety under Ex. K. The defences raised in the case were over-ruled by the first Court which gave a decree to the plaintiff against both the defendants. The second defendant appealed to the lower Court on the ground that he should be held to have been exonerated from all liability by reason of the plaintiff having given up his rights under the mortgage bond executed by the first defendant. The lower appellate Court accepted this contention and dismissed the suit. The decree of the lower appellate Court is very loosely worded and even suggests that it might be construed as a total dismissal of the suit. But it is obvious that the District Judge could not have meant to dismiss the suit even as against the first defendant; if necessary I should be prepared to set right that mistake. Against the lower appellate Court the plaintiff has preferred this appeal, contending that the circumstances of the case are not sufficient to warrant the exoneration of the second defendant under S. 141 of the Contract Act and that a decree should have been given against the second defendant as well.

The question of the discharge of the second defendant by reason of the relinquishment of the mortgage right by the plaintiff was raised by the fifth issue in the case. So far as I am able to gather from the available records, the argument as to relinquishment is based upon a statement in the plaint to the following effect: "The plaintiffs have given up only the mortgage right and filed the suit as on a simple bond." Mr. Sitarama Rao, the learned counsel for the appellant, has translated the vernacular in a slightly different form, but I am content to accept the translation in the above terms given by Mr. V. S. Narasimhachari as this is also the translation adopted by the learned District Judge. Neither of the learned counsel appearing in the case is able to enlighten me as to the circumstances which led to this allegation in the plaint. No attempt has been made either by cross-examination of the plaintiff's witnesses, or by any independent evidence adduced on the other side, to suggest that there was any relinquishment of the mortgage right by the plaintiff except by reason of the above statement contained in the plaint. The only reasonable construction of this statement in the plaint is that the plaintiff is content to enforce the bond as a money claim and does not want a mortgage decree.

Firm of Ayili Mallappa *v.* Parasetti Sidramappa.

I am free to admit that it passes my comprehension why or under what advice the plaintiff came to make this statement in the plaint. It could not have saved him even a pie by way of diminution of the court-fee; not even the most idiotic client would have taken such a step if he had been advised as to the danger that he ran by making such a gratuitous statement for no purpose. I can only express my regret that such is the kind of help and advice still available to litigants. However, if the case clearly falls under S. 141 of the Contract Act it is my duty to apply the law independent of any personal regret of mine. But I am glad to be able to hold that this foolish conduct of the plaintiff has not really deprived him of his rights against the surety.

S. 141 of the Contract Act provides that if the creditor loses or without the consent of the surety, parts with any security held by him against the principal debtor at the time when the contract of suretyship was entered into, the surety is discharged to the extent of the value of the security. With reference to the concluding words of the section, Mr. Sitarama Rao contended that even on the view taken by the lower appellate Court, it ought not to have wholly dismissed the suit as against the second defendant but directed an enquiry as to the extent of the value of the security which the second defendant must be held to have lost by reason of the creditor's conduct. That would no doubt have been the correct course, but in the view I take on the main question in the case, it is unnecessary to pursue that point.

The question for determination is whether the creditor has lost or parted with the security which had been given by the first defendant. I find no specific reference either in the judgment of the first Court or in the judgment of the lower appellate Court to the provision in O. 34, r. 14 of the Civil Procedure Code to the effect that a mortgagee who has obtained decree for payment of money in satisfaction of a claim arising under the mortgage may institute a suit for sale on foot of the mortgage, notwithstanding anything contained in O. 2, r. 2, Civil Procedure Code. The utmost that could be said against the plaintiff in the present case is that he has omitted without the leave of the Court to sue for all the reliefs that he was entitled to. The penalty therefor is indicated in sub-cl. (3) of O. 2, r. 2, Civil Procedure Code. But the provision that I have already extracted from O. 34, r. 14 makes

Firm of Ayili Mallappa *v.* Parasetti Sidramappa.

this penalty inapplicable to a mortgagee who chooses to enforce the money claim without claiming relief by way of sale. The result therefore is that notwithstanding this statement in the plaint, the plaintiff can sue for sale and there is accordingly nothing that precludes him from assigning the mortgage right to the surety as per the terms of Ex. K or precludes the surety from enforcing the mortgage right by reason of the provisions of S. 141 of the Contract Act which entitle him by way of subrogation to the benefit of the securities held by the principal creditor. Mr. Narasimhachari, however, went further and contended that the conduct of the plaintiff is not merely of the kind provided for in O. 2, r. 2 but amounts to a giving up of the mortgage right in the sense of releasing it or extinguishing it. I see no warrant for that contention. As I have already observed, it has nowhere been suggested that there was any other act of relinquishment oral or documentary, except such as might arise from the statement contained in the plaint. That statement can, as I have already held, be reasonably construed only as a statement of an intention not to claim the relief by way of sale. But if it should be held to amount to anything more, it will be inoperative in law because under S. 17 (1) (*b*) of the Registration Act no document which is unregistered can extinguish the mortgage, because the mortgage here was admittedly far more than Rs. 100. I am unable to agree in the view taken by the learned District Judge that what was given up was not only the remedy but the mortgage right itself. In any event, as I have said, the mortgage right cannot in the circumstances be held to have been extinguished because there is no registered document.

My attention was drawn to a decision of the Bombay High Court in *Narayan Govind Ok* v. *Ganesh Atmaram Fadke*[1]. That decision no doubt is in favour of the respondents' contention but it was pronounced at a time when there was no statutory provision corresponding to O. 34, r. 14, Civil Procedure Code. The learned Judges accordingly held that as the course adopted by the creditor had deprived the creditor as well as the surety of the benefit of the security according to the law as it then stood, the surety must be held to be discharged to the extent of the security. Holding the view that by reason of the provisions of O. 34, r. 14, Civil Procedure Code, it is

1. (1870) 7 B. H. C. R. A. C. J. 118.

still open to the plaintiff as well as to the second defendant to sue to enforce the mortgage, I must set aside the decree of the District Judge, which is based on the ground that that right is no longer available to either of them.

Firm of Ayili Mallappa *v.* Parasetti Sidramappa.

The result is that the second appeal must be allowed and the decree of the District Munsif restored. But as the plaintiff has brought this trouble on himself, I am not prepared to make any order as to the costs either in this Court or in the lower appellate Court.

K. C. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW.

Sundara Mudaliar and others .. *Petitioners* (Accused).*

Sundara Mudaliar, *In re.*

The Indian Police Act (V of 1861), S. 32—The Indian Penal Code (XLV of 1860), S. 188—Order of District Superintendent of Police prohibiting processions without license—Disobedience of—Knowledge of order, an essential ingredient.

To sustain a conviction for an offence of disobedience to an order duly promulgated by a District Superintendent of Police, either under S. 188, Indian Penal Code or under S. 32 of the Indian Police Act, it is necessary to prove that the accused had knowledge of the order with disobedience of which he is charged.

Petition under Ss. 435 and 439 of Criminal Procedure Code, 1898, praying the High Court to revise the judgment of the Court of the Joint Magistrate of Ramnad in C. A. No. 8 of 1936, preferred against the judgment of the Court of the Sub-Magistrate of Mudukalathur in C. C. No. 689 of 1935.

K. S. Jayarama Aiyar and *G. Gopalaswami* for Petitioners.

The Public Prosecutor on behalf of the Crown.

The Court made the following

ORDER.—The petitioners, eight in number, were charged and convicted by the Second Class Magistrate, Mudukalathur, of an offence punishable under the second part of S. 188, Indian Penal Code. The case against them was that they took part in a procession in Abiraman village on 9th August, 1935, at 9-45 P.M., without taking a license as required by an order promulgated by the District Superintendent of Police, Ramnad, under S. 30 (2) of the Indian Police Act early in May 1935. The main defence of the petitioners was that they had no knowledge of this order of the District Superintendent of Police and

* Cr. R. C. No. 560 of 1936.
Cr. R. P. No. 514 of 1936.   14th January, 1937.

Sundara Mudaliar, *In re.*

they examined a number of defence witnesses to the effect that they also—the defence witnesses—had no knowledge of the order. The trying Magistrate did not however definitely find whether the petitioners had or had not knowledge of the order in question, but merely remarked that the defence witnesses were interested. In appeal, the Joint Magistrate of Ramnad was of opinion that the only point for him to decide was whether the accused had knowledge of the order. He was of opinion that mere proof of publication of the order by tom-tom is not sufficient to lead to the inference that the accused had knowledge of the order so far as the charge under S. 188 (2), Indian Penal Code, was concerned. He thought however that such knowledge was not required to be proved in respect of an offence punishable under S. 32 of the Indian Police Act. In other words, he drew a distinction between S. 188, Indian Penal Code, and S. 32 of the Indian Police Act, so far as the element of knowledge as an essential ingredient of the offence is concerned. There is really no foundation for this distinction, as will be seen from the decision of the Calcutta High Court in *Debendranath Mandal* v. *Emperor*[1]. It is seen from this decision as well as from another decision of the Calcutta High Court, *Ramdas Singh* v. *Emperor*[2], that knowledge of the order is a necessary ingredient of both offences, namely, the offences punishable under S. 188, Indian Penal Code and S. 32, Indian Police Act. It must therefore be said that the modification ordered by the Joint Magistrate of the conviction under S. 188, Indian Penal Code, into one under S. 32 of the Indian Police Act cannot be supported in law. There being no clear finding that any of the petitioners, the accused in the case, had knowledge of the order the disobedience of which is charged against them, their convictions cannot be sustained. They are accordingly set aside and the sentences imposed upon them are also set aside and they are acquitted of the offences charged against them. The fines, if paid, must be refunded to them.

S. V. V. —— *Convictions set aside.*

---

1. (1930) I.L.R. 58 Cal. 879. 2. (1926) I.L.R. 54 Cal. 152.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VARADACHARIAR AND MR. JUSTICE MOCKETT.

Sri Mahant Sitaram Dass Bavaji .. *Appellant** (*Plaintiff*)

v.

The Madras Religious Endowment Board, Madras and others .. *Respondents* (*Defendants and Nil*).

Sri Mahant Sitaram Dass Bavaji *v.* The Madras Religious Endowment Board.

Madras Hindu Religious Endowments Act (II of 1927), S. 63 (1) (c)—Power to frame scheme for management of properties—Power to settle properties and ascertain them—Co-trustee appointed should act without superseding the Mahant already existing.

S. 63 of the Hindu Religious Endowments Act undoubtedly gives power to the Board to frame a scheme for the management of the institution and this power carries with it the power to settle what the properties of the institution are, so that the authority framing the scheme may know what properties are to be governed by the scheme and what the resources are whose disposal is to be provided for by the scheme.

Vaithinatha Aiyar v. *Thyagaraja Aiyar*, (1919) 41 M.L.J. 20 and *Vaidyanatha Aiyar* v. *Swaminatha Aiyar*, (1924) 47 M.L.J. 361: L.R. 51 I.A. 282: I.L.R. 47 Mad. 884 (P.C.), referred to.

S. 63 does not contemplate that a person appointed to act as co-trustee should supersede the Mahant in all important matters. No doubt the necessity for some provision to the working of the institution in the event of a deadlock between the two trustees can be appreciated; but the Board or other competent authority must devise some means of ensuring it in a form consistent with the provisions of the Act.

Where a paid co-trustee appointed under a scheme under S. 63 (1) (*c*) of the Hindu Religious Endowments Act was allowed the right to have his views and intended actions prevail over the Mahant and the result seemed to be that the position of the Mahant was virtually negligible " in all important matters",

Held, that the Mahant would remain under the circumstances a mere cipher so far as secular matters were concerned and so far as the powers were concerned he might very well have been removed. That position was not contemplated by any of the relevant provisions of the Act. Therefore the clauses in the scheme which gave uncontrolled power to the paid new trustee should be removed and a general direction given that the new trustee should have the powers which a co-trustee would have under the general law.

Appeal against the decree of the District Court of Ganjam in O. S. No. 34 of 1928.

B. Jagannadha Doss for Appellant.

P. V. Rajamannar for Respondents.

The Court delivered the following

Varadachariar, J.

JUDGMENTS. *Varadachariar, J.*—This appeal arises out of a suit under S. 63 (4) of the Hindu Religious Endowments

* Appeal No. 189 of 1931. 14th September, 1936.

Sri Mahant Sitaram Dass Bavaji *v.* The Madras Religious Endowment Board.

Varadachariar, J.

Act, impugning a scheme framed by the Board for the management of a group of mutts. Only two points have been pressed before us: (1) as to the propriety of giving the associate trustee overriding powers over the Mahant, and (2) as to the power of the Board to settle a list of properties belonging to the institution. The latter point may be briefly disposed of.

It does not appear from the record whether any objection was taken by or on behalf of the Mahant before the Board about the properties to be included in the list attached to the scheme of properties belonging to the mutt. We cannot agree with the contention advanced by Mr. Jagannath Doss, on behalf of the Mahant, that the Board has no power to settle such a list. S. 63 undoubtedly gives power to the Board to frame a scheme for the management of the institution and this power carries with it the power to settle what the properties of the institution are, so that the authority framing the scheme may know what properties are to be governed by the scheme and what the resources are whose disposal is to be provided for by the scheme. A question of this kind was raised before this Court in *Vaithinatha Aiyar* v. *Thyagaraja Aiyar*[1] and the learned Judges held that in a suit under S. 92, Civil Procedure Code, asking for the framing of a scheme, the Court has the power to settle the question whether certain properties belong to the institution or not. This decision was confirmed on appeal by the Privy Council in *Vaidyanatha Aiyar* v. *Swaminatha Aiyar*[2] and though the question of the Court's power was not specifically raised before their Lordships, the Judicial Committee did deal with the merits of the claim, thus clearly implying that this was within the legitimate scope of the Court's power when framing a scheme. Some observations on this question will also be found in *Anjaneya Sastri* v. *Kothandapani Chettiar*[3].

In the lower Court an attempt was also made to prove that some of the properties included in the list attached to the scheme Ex. F are the private properties of the Mahant and do not belong to the mutt. In support of that claim, reliance was placed on the circumstance that these properties came to the present Mahant under the will of his predecessor Ex. D. As the learned Judge has pointed out, this will makes no distinction

1. (1919) 41 M.L.J. 20.
2. (1924) 47 M.L.J. 361: L.R. 51 I.A. 282: I.L.R. 47 Mad. 884 (P.C.).
3. (1935) 43 L.W. 409.

Sri Mahant Sitaram Dass Bavaji *v.* The Madras Religious Endowment Board.

Varadachariar, J.

between the properties now claimed as the private properties of the Mahant and the other properties in respect of which no doubt has been raised as to the ownership of the mutt. From the few sale deeds filed in the case, it no doubt appears that some of those properties were purchased in the name of the prior Mahant; but it being admitted that he was an ascetic and celibate and the head of the institution, the probabilities are that they were purchased with the funds of the institution. At any rate, in the absence of anything to show any difference in his method of dealing with these properties as compared with the other admitted properties of the institution, the Court is entitled to draw the inference that he purchased them for the benefit of the institution. We therefore see no reason to interfere with the lower Court's decision on this point.

Proceeding next to the objection taken to cls. 2 and 3 of the scheme, we think that the appellant's objection to these clauses is well founded. We agree with the learned Judge that the circumstances justify the appointment of an associate trustee; but S. 63 does not contemplate that the person so added is in effect to *supersede* the Mahant. Cl. 2 of the scheme almost makes it clear that the new trustee is to have the management of the institution, with a vague direction that in so managing it, he may avail himself of the help and advice of the Mahant in all important matters. We are not satisfied that this kind of substantial supersession of the Mahant is warranted by the terms of S. 63. Cl. 3 of the scheme gives further effect to the principle underlying cl. 2 by declaring that in matters in which the Mahant might not co-operate with the paid trustee, the paid trustee should have the power to act independently of him. It is true that the scheme draws a distinction between religious matters and secular matters and leaves the Mahant comparatively free in religious matters. This distinction is more easily drawn on paper than worked in practice. But apart from that consideration, for the reasons we have already given, this kind of special power conferred on the new trustee is not warranted by the Act. We appreciate the necessity for some provision to ensure the working of the institution in the event of a deadlock between the two trustees; but the Board or other competent authority must devise some means of ensuring it in a form consistent with the provisions of the Act. We must accordingly direct that cls. 2 and 3 of the scheme Ex. F, must be omitted and a general provision insert-

Sri Mahant Sitarani Dass Bavaji v. The Madras Religious Endowment Board. Varadachariar, J.

ed that the paid trustee appointed under cl. 1 shall have the powers which a co-trustee will have under the general law.

We are informed that the locality in which the suit institution is situate has now ceased to form part of this presidency and we do not know which authority will in the new state of things be competent to deal with this institution by way of supervision. All that we can do at this stage is to leave the matter with the above direction, so that any other authority competent to give further directions may do so when the contingency contemplated by cl. 6 of the scheme is availed of.

The appeal is accordingly allowed to the extent above indicated and in other respects dismissed. There will be no order as to costs because the parties succeed in part and fail in part.

Mockett, J.

Mockett, J.—I agree.

Under S. 63 (1) (*c*) of the Hindu Religious Endowments Act provision is made for associating one or more persons with the trustee for the purpose of participating or assisting in the administration of the endowments By that I understand that the person appointed is to participate with the trustee and to assist the trustee. What has happened in this case is that a paid trustee has been appointed who as I understand cl. 2 of the scheme has the right to have his views and intended actions prevail over the present Mahant and the result seems to be that the position of the Mahant is virtually negligible. It is the paid trustee who is to manage the institution, he can ask for the advice and the help of the Mahant but nothing is said about the necessity for him to accept them and the whole of that part of the scheme is qualified by the most ambiguous words " in all important matters ". Then cl. 3 " if the Mahant does not co-operate, the paid trustee can act independently ". It seems to me the result is that the Mahant remains there as a mere cipher so far as secular matters are concerned and so far as the powers are concerned he might very well have been removed. In my view this position is not contemplated by any of the relevant provisions of the Act. If the Board desire to remove the trustee, provision is made by S. 73. If they desire to retain him then provision must be made as indicated by my learned brother for a scheme by which he continues to function but in co-operation with somebody else nominated by the Board.

K.C. — *Appeal allowed in part.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Fort William in Bengal.]

PRESENT:—LORD MAUGHAM, SIR LANCELOT SANDERSON AND SIR SHADI LAL.

Sarat Chandra Basu .. *Appellant**

v.

Sir Bijoy Chand Mahatab Maharajadhiraj Bahadur of Burdwan .. *Respondent.*

P.C.
Sarat Chandra Basu
v.
Bijoy Chand Mahatab.

Power of Attorney—Authentication to execute and register kabuliyat—*Validity of presentation of document for registration—"The Registrar or Sub-Registrar within whose district or sub-district the principal resides"—Indian Registration Act (XVI of 1908), S. 33, sub-S. (1), cl. (a)—Effect.*

A *kabuliyat* was presented for registration by one, *N*, agent for the executant *M* under a general Power of Attorney. The *kabuliyat* was executed on 30th August, 1916, in favour of the plaintiff on behalf of four persons including the present appellant. The plaintiff sued for recovery of money due on the contract, evidenced by the *kabuliyat*. The defendant, the present appellant, pleaded that the *kabuliyat* was neither executed nor registered by him or by any person authorised by him to act on his behalf; and that he was not therefore bound by the covenants contained therein inasmuch as the power of attorney, given by the appellant to one, *N*, who executed the *kabuliyat* was not authenticated as required by law, and, further, that it did not authorise him to execute the *kabuliyat*. The ground of objection was that the principal resided within the jurisdiction of the Sub-Registrar of Burdwan and not at Hazaribagh where the power was authenticated. The Sub-Registrar had however endorsed that the executant was at that time residing at Hazaribagh.

Held, that the power of attorney authorised *N* to execute and register the *kabuliyat*, that it was not invalid on the ground of non-residence of the executant, and that the *kabuliyat* was validly presented for registration.

Held, further, that the power of attorney in favour of *N* was a general power of attorney and authorised him to represent his principal in various matters, including the registration of documents, and contained no restriction, but that while *N* was authorised to act on behalf of *M* in respect of the documents executed by the latter alone, he had no authority to represent him in connection with a document executed by his principal jointly with any other person or persons.

If a document is executed by two or more persons, it is not necessary that all of them should present it for registration and the presentation thereof by one of them is a sufficient compliance with the law.

The expression "resides" in S. 33 of the Indian Registration Act does not contemplate only permanent residents but includes temporary residents.

Judgment of the Calcutta High Court (Costello and Lort Williams, JJ.) affirmed.

These are three consolidated appeals from three decrees of the High Court of Judicature at Fort William in Bengal, one

* P. C. Appeal No. 73 of 1935. 22nd January, 1937.
Bengal Appeals Nos. 54, 82 and 83 of 1932.

P.C.
Sarat Chandra Basu *v.* Bijoy Chand Mahatab.

of which is dated the 10th April, 1934, and the other two are dated the 19th July, 1934, affirming three decrees passed by the said High Court in its original jurisdiction dated 18th April, 1932. The main point for decision in each of these appeals is whether *kabuliyats* which form the basis of the suits were properly registered in accordance with the provisions of the Indian Registration Act, 1908.

On 30th August, 1916, four persons, one of whom was the present appellant executed a *kabuliyat* in favour of the Maharajadhiraj Bahadur of Burdwan by which they obtained the lease of certain underground coal rights. The *kabuliyat* contained various stipulations for the payment of royalties and commission on the coal extracted from the mines. The relevant terms of the *kabuliyat* and of a power of attorney which had been executed by the appellant in favour of Natobar Mukhopadhya dated 8th August, 1916, and by Devendra Nath Mitra Mazumdar (one of the lessees under the *kabuliyat*) in favour of one, Fakir Chandra Sarkar, are referred to in the judgment of their Lordships.

The present suits were brought by the Maharajadhiraja for the recovery of the money due under the registered *kabuliyat.* The action was tried by Mr. Justice Buckland on 15th and 18th April, 1932. At the trial the following issues were framed:—

(1) Was the *kabuliyat* in suit duly registered? If not, is the suit maintainable?

(2) Had Natobar Mukerji authority from the defendant (Sarat Chandra Basu) to execute the *kabuliyat*?

(3) Was there consideration for the *kabuliyat*?

(4) Is the suit maintainable by the plaintiff through the Manager of the Court of Wards and without joining the coparceners?

On the question of presentation for registration, the trial Judge cited the following passage from the judgment of Lord Buckmaster in *Chhotey Lal* v. *Collector of Moradabad*[1]:

> "The fact that the presentation is accepted by the Sub-Registrar as in proper form is, however, *prima facie* evidence that the conditions have been satisfied; and after such acceptance the burden of proving any alleged informality rests on the person who challenges the registration."

The trial Judge held that the presumption was in the respondent's favour and that the suit must succeed.

On 1st June, 1932, the appellant gave notice of appeal to the High Court in its appellate jurisdiction. The appeal was heard by Costello and Lort Williams, JJ., who delivered judgment on 10th April, 1934, dismissing the appeal.

---

1. (1921) L.R. 49 I.A. 375: I.L.R. 44 All. 514 (P.C.).

P.C.

Sarat Chandra Basu *v.* Bijoy Chand Mahatab.

A. M. Dunne, K.C., L. P. E. Pugh, J.M. Pringle, S. N. Banerji (Sr.) and *P. C. Basu* for Appellant.—The power of attorney did not authorise Natobar to execute the *kabuliyats* but only affected to relate to the execution of agreements as expressed therein arrived at between himself and his prospective co-lessees. The power of attorney was not legally authenticated. The power of attorney does not authorise Natobar to sign the *kabuliyat* from the Burdwan Raj; the proper construction of the power of attorney is that it authorises him to sign an agreement amongst the four lessees agreeing together to take the lease from the Burdwan Raj. That is the proper construction. On the question of accepting the official translation refers to *Sasiman Chowdhurain* v. *Shib Narayan Chowdhury*[1] and to *Rajendra Prasad Bose* v. *Gopal Prasad Sen*[2]. There was no legal presentation of the *kabuliyat* before the Registering Officer. It was not a good presentation because it was not presented under a power of attorney which enabled the presentor to represent all the four lessees. *Dottie Karan* v. *Lachmi Prasad Sinha*[3]. The provisions of the Registration Act must be strictly construed. *Jambu Pershad* v. *Muhammad Aftab Khan*[4]. There was no appearance by or on behalf of the appellant before the Registering Officer. There was no admission of execution of the *kabuliyats* by or on behalf of the appellant before the Registering Officer. Refers to Ss. 34 and 35 of the Registration Act, 1908.

L. P. E. Pugh followed for Appellant submitted that the executant is the person who is intended to be bound by the document, and in this case the executant was Sarat Chandra Basu and not Natobar. The executant did not appear and he did not admit execution. Natobar admitted execution only for himself. Refers to *Monmotho Nath Mukerjee* v. *Puran Chand Nahatta*[5]. On the question of construction of the power of attorney refers to *Re Dowson and Jenkins's Contract*[6].

Walter Moncton, K.C. and *W. Wallach* for Respondent.—As to the appellant's contention that it did not appear upon the face of the *kabuliyat* in suit that execution had been admitted on his behalf and that the *kabuliyat* had not been registered on his behalf, it appears upon the face of the *kabuliyat* that it was executed by Natobar acting as the agent of the appellant and not on his own behalf. As Natobar was one of the persons executing the

1. (1921) 42 M.L.J. 492: L.R. 49 I.A. 25 at 31: I.L.R. 1 Pat. 305 (P.C.).
2. (1930) 59 M.L.J. 615: L.R. 57 I.A. 296 at 301 (P.C.).
3. (1930) 60 M.L.J. 441: L.R. 58 I.A. 58 at 66: I.L.R. 10 Pat. 481 (P.C.).
4. (1914) 28 M.L.J. 577: L.R. 42 I.A. 22 at 29: I.L.R. 37 All. 49 (P.C.).
5. (1925) 29 C.W.N. 539 at 552.
6. (1904) L.R. 2 Ch.D. 219 at 222.

P.C.

Sarat Chandra Basu *v.* Bijoy Chand Mahatab.

kabuliyat an admission of execution by him effectively complied with the provisions of S. 34 of the Registration Act, 1908 and bound the Registrar to register the *kabuliyat* under the provisions of S. 35. As to the appellant's contention that Sarkar's power authorised him to present for registration documents executed by his principal alone and not documents executed by his principal along with other persons, it appears from the terms of Sarkar's power of attorney that he was authorised to present the *kabuliyat* whether it had been executed by his principal alone or by his principal along with other persons. On the point under Ss. 34 and 35 of the Registration Act refers to Mulla's Registration Act, 3rd ed., p. 138; *Muhammad Ewaz* v. *Birj Lal*[1], *Sitaram Laxman Rao* v. *Dharmasukhram*[2] and *Jambu Pershad* v. *Muhammad Aftab Khan*[3]. You are not limited to the person actually signing but the section can be read to include the person on whose behalf the signature has been given. What has to be admitted is the signature of the attorney, and he comes to admit it himself, he is the proper person. The attorney is the executant. *Puran Chand Nahatta* v. *Monmotho Nath Mukerjee*[4]. There is a presumption which arises from the endorsement upon the *kabuliyat* that the necessary steps have been taken by the Registrar which gives him authority to register the document. *Chhotey Lal* v. *Collector of Moradabad*[5]. Indian Evidence Act, S. 114.

Dunne, K.C., replied and referred to *Monmotho Nath Mukerjee* v. *Puran Chand Nahatta*[6] and *Satish Chandra Basu* v. *Harendra Kumar Ghose*[7].

22nd January, 1937. Their Lordships' judgment was delivered by

Sir Shadi Lal.

SIR SHADI LAL.—This consolidated appeal raises the question of the validity of the execution and the registration of a *kabuliyat*, under which the appellant, Sarat Chandra Basu, with other persons, obtained a lease of the coalmines in certain villages belonging to the respondent, the Maharaja of Burdwan. The suits, which have led to the appeal, were originally instituted by the lessor against the appellant and his co-lessees, but they were subsequently withdrawn as against the co-lessees, and proceeded to trial as against the appellant only. The claim

---

1. (1877) L. R. 4 I.A. 166 at 171: I.L.R. 1 All. 465 (P.C.).
2. (1927) I.L.R. 51 Bom. 971 at 979 (F.B.).
3. (1914) 28 M.L.J. 577: L.R. 42 I.A. 22 at 29: I.L.R. 37 All. 49 (P.C.).
4. (1927) 54 M.L.J. 473: L.R. 55 I.A. 81 at 84: I.L.R. 55 Cal. 532 (P.C.).
5. (1922) L.R. 49 I.A. 375 at 379: I.L.R. 44 All. 514 (P.C.).
6. (1925) 29 C.W.N. 539 at 552.
7. (1936) 40 C.W.N. 1051 at 1052.

P.C.

Sarat Chandra Basu *v.* Bijoy Chand Mahatab.

Sir Shadi Lal.

was resisted by him on various pleas, mainly of a technical character; but he was defeated in both the Courts in India. He has now appealed to His Majesty in Council, and their Lordships have, after examining the arguments presented on behalf of the parties, reached the conclusion that there is no valid ground for dissenting from the view taken by the Courts below.

The *kabuliyat*, upon which the claim was founded, was executed on the 30th August, 1916, in favour of the plaintiff on behalf of four persons including Sarat Chandra Basu. It contained various stipulations for the payment of royalties and commission on the coal extracted from the mines, and the suits were brought for the recovery of the money due to the plaintiff on the contract. The defendant pleaded that the *kabuliyat* was neither executed nor registered by him or by any person authorised by him to act on his behalf; and that he was not, therefore, bound by the covenants contained therein.

The document purports to have been executed by one Natobar Mukerjee, who had a power of attorney from the defendant. His power to execute the *kabuliyat* is, however, challenged on two grounds:—(1) That the power of attorney was not authenticated as required by law. (2) That it did not authorise him to execute the *kabuliyat*.

There can be no doubt that, if Natobar Mukerjee had no authority in law to act on behalf of the defendant, the latter cannot be held liable for the breach of the contract embodied in the *kabuliyat*. It is, therefore, necessary to determine whether these objections are well-founded. With reference to the first objection, reliance is placed upon S. 32 of the Indian Registration Act, XVI of 1908, which enacts the law relating to the presentation of a document for registration. It provides that the presentation may be made by the person executing the document, or by the person in whose favour it is executed, or "by the agent of such person duly authorised by power of attorney executed and authenticated in manner hereinafter mentioned." The manner, in which a power of attorney is to be executed and authenticated, is prescribed by S. 33 of the statute. It is enacted by clause (*a*) of sub-S. (1) of that section that if the principal, at the time of executing the power of attorney, resides in British India, the power of attorney shall be executed before, and authenticated by, the Registrar

P.C.

Sarat Chandra Basu v. Bijoy Chand Mahatab.

Sir Shadi Lal.

or sub-Registrar within whose district or sub-district the principal resides. Does the power of attorney in question satisfy this requirement? The defendant contends that it does not comply with the law, because it was executed before, and authenticated by, the sub-Registrar of Hazaribagh, while the principal was a resident of Burdwan. It is true that he ordinarily resided at Burdwan, but the endorsement of the sub-Registrar on the document expressly states that he was living, at that time, at Hazaribagh. The endorsement also shows that he was personally known to the sub-Registrar, and it is not likely that a mistake would be made about his place of residence. Indeed, no attempt has been made to prove that he was not then residing at Hazaribagh, and that the statement in the endorsement is incorrect.

The expression "resides," as used in S. 33, is not defined in the statute; but there is no reason for assuming that it contemplates only permanent residence and excludes temporary residence. The Courts in India are agreed that at the time in question Sarat Chandra Basu was residing at Hazaribagh, and their Lordships concur in the conclusion that the power of attorney was duly executed and authenticated.

Nor do they think that the power of attorney authorised Natobar Mukerjee to execute and register another document, and not the *kabuliyat*. It is common ground that four persons had agreed to work coal mines in certain villages by taking a lease of them from the plaintiff; and they had to execute a document called *kabuliyat* in his favour containing the terms of the contract entered into between the lessees and the lessor. The plaintiff maintains that it was in connection with the execution of the *kabuliyat* in question that Sarat Chandra Basu gave the power of attorney to Natobar Mukerjee in order to authorise the latter to act on his behalf. The defendant, on the other hand, argues that the power was given to the attorney for the purpose of executing and registering another document, namely, the agreement between the lessees defining their rights and liabilities *inter se* arising out of the projected lease.

The determination of the dispute depends upon the meaning of the relevant passage of the power of attorney. The document is written in the Bengali language, and it is only its translation in English which is before their Lordships. The

P.C.
Sarat Chandra Basu v. Bijoy Chand Mahatab.
Sir Shadi Lal.

parties are, however, at variance as to the correctness of the translation printed in the record. It is urged by the learned counsel for the plaintiff that this translation is incorrect, and he invites their Lordships' attention to another translation, which appears to have been acted upon by the Court of Appeal in India.

The history of these two rival translations may be shortly stated. The suits were tried on the original side of the High Court at Calcutta, and in compliance with the rules of that Court an English translation of the power of attorney made by the official translator was filed by the plaintiff in the Trial Court. This translation may hereinafter be described as "official" translation. Before the commencement of the trial, he applied to the Court for leave to administer interrogatories to the defendant and produced with the affidavit in support of his application an English translation of the power of attorney which was made or obtained by his attorneys. The second translation may be called "unofficial" translation.

There is a divergence between the two translations, and it appears that both of them were placed on the record of the Trial Court. When the claim was allowed against the defendant in that Court, he preferred appeals to a Division Bench of the High Court; and it is clear that it was the unofficial translation which was included in the paper-book printed for the appeals. The paper-book was prepared on behalf of the defendant, who was the appellant, and he was responsible for the inclusion of the documents in that book. He, however, attributes the inclusion of the unofficial translation to inadvertence. Be that as it may, there can be little doubt that the unofficial translation was the only translation which was referred to by the Court that heard and determined the appeals. But in the book printed for the hearing of the present appeal it was the official translation which was included.

The plaintiff thereupon made an application to the High Court on the 20th February, 1936, praying that it should be recorded that the official translation, which had been printed in the paper-book for the Privy Council, was not the correct translation of the original document, but that the translation which he had annexed to his application was the correct translation. He also suggested that the Registrar of the High Court should transmit to the Registrar of the Privy Council the record dealing with the correction and the order to be made

P.C.

Sarat Chandra Basu v. Bijoy Chand Mahatab.

Sir Shadi Lal.

by the Court in the matter. This application was dismissed by the High Court on the ground that it should have been made to His Majesty in Council.

There is admittedly a material difference between the two translations of the passage describing the document which Natobar Mukerjee was empowered to execute on behalf of his principal. Both the translations contain a recital of the fact that four persons, including Sarat Chandra Basu, had arranged to take a lease for 999 years of certain villages with "under-ground right" from the Burdwan Raj estate on specified terms. There is no dispute about this recital. It is the passage following the recital which has caused controversy between the parties. According to the official translation the passage in question is in these words:—

> "In this connection an agreement has been executed amongst us four persons. Now, in order to execute and register the said agreement on my behalf, I appoint Sri Natobar Mukerjee, caste Brahman, occupation service, at present of Raneegunge town in the District of Burdwan, as my special attorney".

The unofficial translation of that passage is as follows:—

> "And whereas an Agreement Deed has been written up between the parties for the purpose, now I appoint Natobar Mukerjee of Burdwan at present of Ranigunj, son of Ambica Charan Mukhopadhya, deceased, by caste Brahmin, by profession service-holder, my constituted attorney to execute the said agreement deed and register the same on my behalf".

It will be observed that, if the official translation is correct, Natobar Mukerjee was empowered to execute and register the agreement entered into "amongst us four persons," and it is suggested by the appellant that the four persons alluded to were the four lessees. It is, therefore, argued that the attorney had no authority to execute and register the *kabuliyat* which embodied the contract, not between the four lessees, but between the lessees on the one side and the Burdwan Raj on the other side.

The respondent, on the other hand, maintains that the original power of attorney mentions, not "four persons", but "the parties"; and that the phrase "the parties" means the parties to the lease, namely, the lessees and the Burdwan Raj. It is said that this description of the document applies to the *kabuliyat* which alone was the agreement "written up" between the parties.

The difference between the two translations is vital, as it affects the validity of the instrument which is the foundation

P.C.

Sarat Chandra Basu *v.* Bijoy Chand Mahatab.

Sir Shadi Lal.

of the respondent's claim. When the accuracy of an English translation of a document written in the vernacular language is challenged, the rule ordinarily followed by this Board is to accept the translation as correct, if it was made by a translator appointed by a Court in India and not challenged before the Judges who had dealt with the case. It is obvious that their Lordships are not in a position to say that such translation should be held to be incorrect. If they are, however, satisfied that there is a genuine doubt about its correctness, they would remit the matter to the High Court in India, from which the appeal has been brought, for an inquiry into it, and direct it, if necessary, to have another translation made under the direction of the Court and to transmit it to the Registrar of the Privy Council.

The question is whether a reference should be made to the High Court at Calcutta in order to settle the dispute between the parties. Now, it is true that the translation relied upon by the respondent was not made by a translator appointed by the Court, but it was not only placed on the record of the Trial Court, but also was included in the record printed for the Court of Appeal in India and apparently acted upon by that Court. These circumstances, which create a reasonable doubt about the accuracy of the official translation, would justify an inquiry by the High Court as to which of the two translations should be accepted as correct. Their Lordships, however, consider it unnecessary to delay the decision of the appeal by making a reference to India, because it is admitted by the learned counsel for the appellant that there is no word in the original power of attorney which is equivalent to the word "four" as used in the phrase "amongst us four persons" to be found in the official translation. The original expression can be correctly translated as "between us both parties." It is also admitted that the Bengali word, which has been translated in the official translation as "executed," might properly be translated as "written and read."

There are also other considerations which militate against the official translation. According to this translation, the document embodying the agreement "amongst us four persons" had already been "executed"; and it would obviously be absurd to empower the attorney to "execute" the same document again. But the rival translation does not lead to any

P.C.

Sarat Chandra Basu
v.
Bijoy Chand Mahatab.

Sir Shadi Lal.

such incongruity. After reciting that the "Agreement Deed" between the parties had been "written up," it authorises the attorney to execute and register it. Indeed, it is conceded that there was no document to which the lessees alone were parties, which, at that time, required execution and registration; and the power of attorney, if it related to a document of that description, would be wholly infructuous. But a document containing the terms of the contract between the lessor and the lessees was yet to be executed and registered.

Moreover, the lessees obtained possession of the villages leased to them by the plaintiff several years ago and have since been working the coal mines; and there is no document except the *kabuliyat* which defines their rights and duties *vis-a-vis* the lessor. It is impossible to assume that they had obtained the right of working the mines, and had been allowed to take away coal therefrom, without any contract in writing. Indeed, they had been paying the rents and royalties as set out in the *kabuliyat* until the commencement of the dispute, which led to this litigation.

It is unnecessary to dilate upon the subject, as their Lordships are convinced that it was the *kabuliyat,* and no other document, which Natobar Mukerjee was authorised by the power of attorney to execute and register on behalf of the appellant. They accordingly hold that the grounds, upon which the validity of the execution of the *kabuliyat* was sought to be impeached, cannot be sustained. It must, therefore, operate as an instrument duly executed by the appellant.

It is then argued that the document was not validly registered as it was not presented for registration as required by the Indian Registration Act. It is undeniable that, if a document is executed by two or more persons, it is not necessary that all of them should present it for registration; and that the presentation thereof by one of them is a sufficient compliance with the law.

Now, the endorsement by the sub-Registrar on the instrument shows that it was presented for registration by one Fakir Chandra Sarkar, "agent for the executant Devendra Nath Mitra Mazumdar under a general Power of Attorney No. 41 for 1904, authenticated by the special sub-Registrar of Burdwan." It is beyond dispute that Mazumdar was one of the executants of the *kabuliyat,* but it is argued that, while

P.C.
Sarat Chandra Basu v. Bijoy Chand Mahatab.
Sir Shadi Lal.

Sarkar was authorised to act on behalf of Mazumdar in respect of the documents executed by the latter alone, he had no authority to represent him in connection with a document executed by his principal jointly with any other person or persons. There is no foundation for this contention. The power of attorney in favour of Sarkar is a general power of attorney, and authorises him to represent his principal in various matters, including the registration of documents. It contains no such restriction as is suggested by the appellant.

There was, in their Lordships' view, a proper presentation of the *kabuliyat* for registration; and it is not argued that its registration was invalid on any other ground.

The Courts in India have rightly held that the appellant's liability on the *kabuliyat* has been established, and the appeal preferred by him should be dismissed with costs. Their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellant: *T. L. Wilson & Co.*

Solicitors for respondent: *Solicitor, India Office.*

R. C. C. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATARAMANA RAO.

Pakalapati Veerayya .. *Appellant* (Plaintiff)*

v.

Devulapalli Sobhanadri .. *Respondent (Defendant).*

Veerayya v. Sobhanadri.

The Indian Contract Act (IX of 1872), S. 23—Civil liability and a criminal offence—Prosecution launched—Offence one compoundable only with permission of the Criminal Court—Permission to compound not obtained—Agreement to pay a sum in settlement of civil liability—The withdrawal of prosecution part of the bargain—If agreement enforceable at law.

Though a transaction between the parties may involve a civil liability as well as a criminal offence, a settlement of the civil liability will be vitiated by the fact that a criminal prosecution already launched is withdrawn if it was part of the bargain that the prosecution should be so withdrawn. It need not have been the sole bargain, nor is it necessary that the agreement should specifically state that part of the consideration was an agreement to settle the criminal prosecution. The true rule is that where there is an existing debt or an obligation a creditor is not precluded from taking any security therefor by threat of a criminal prosecution and the security is not vitiated by the fact that he was induced to abstain from prosecuting the debtor. But if it is a part of the bargain that the creditor should not prosecute the debtor, the security taken for the debt will be unenforceable.

---

* S.A. No. 462 of 1932. 30th March, 1936.

Veerayya *v.* Sobhanadri.

Where the defendant and his father executed a sale-deed in favour of *B.S.* and others without disclosing the existence of a mortgage on it and when the purchaser in execution of the mortgage decree sued for possession the said *B.S.* launched a criminal prosecution against his vendees for cheating under S. 420, Indian Penal Code and subsequently withdrew the prosecution (without the permission of the Court having been obtained to compound) as a result of an agreement between the parties in and by which it was arranged that Rs. 700 should be paid in full settlement of the disputes, of which Rs. 200 was to be immediately paid and Rs. 500 a year later, and it was part of the bargain that the criminal case should be closed up.

Held, that the arrangement is unlawful and the claim for the Rs. 500 is unenforceable under S. 23 of the Contract Act.

Flower v. *Sadler*, (1882) 10 Q.B.D. 572; *Dwijendra Nath Mullick* v. *Gopiram Gobindaram*, (1925) I.L.R. 53 Cal. 51 and *Narasimhulu Naidu* v. *Naina Pillai*, A.I.R. 1929 Mad. 7, distinguished.

Kamini Kumar v. *Birendra Nath*, (1930) 59 M.L.J. 82: L.R. 57 I.A. 117: I.L.R. 57 Cal. 1302 (P.C.), followed.

Appeal against the decree of the Court of the Subordinate Judge of Bezwada in A. S. No. 28 of 1931, preferred against the decree of the Court of the District Munsiff of Bezwada in O. S. No. 159 of 1930.

P. Satyanarayana Rao for Appellant.

V. Rangachari for Respondent.

The Court delivered the following

JUDGMENT.—This is a suit upon a promissory note dated 6th August, 1924, executed by the defendant in favour of the plaintiff. The case for the plaintiff is that the amount was paid in cash. The execution of the pronote is admitted but the consideration is denied. The case for the defence is that the said promissory note was executed in view of a pending settlement of a criminal prosecution and a civil liability in respect of the sale of immovable property effected by the defendant and his father in favour of one Boddaluru Seshayya and four others; the complaint of the vendees was that on the date of the sale to them there was a mortgage on the property which was not disclosed. A decree was obtained on the footing of the said mortgage and the property sold in execution thereof and a suit was instituted for recovery of possession from the vendees. The said Boddaluru Seshayya thereupon launched a criminal prosecution being C. C. No. 100 of 1924 on the file of the Additional Deputy Collector, Bezwada, for cheating under S. 420, Indian Penal Code. The complaint was no doubt filed by the said Seshayya but all the other vendees were cited as witnesses for the prosecution. The plaintiff was interesting

Veerayya v. Sobhanadri.

himself on behalf of the vendees and there were negotiations to bring about an adjustment of the disputes between the defendant and the vendees; the defendant was anxious that the criminal prosecution should be withdrawn and he was willing to be guided by what the plaintiff would direct him to do. Pending the final settlement of this matter the defendant executed a promissory note for Rs. 500 but finally an arrangement was come to which was embodied in a document Ex. V in and by which it was arranged that a sum of Rs. 700 should be paid in full settlement of the disputes and that Rs. 200 should be paid immediately and the balance of Rs. 500 within a year from the date of the agreement to the plaintiff on behalf of the vendees and on failure to pay the same the vendees could have recourse to such civil proceedings as they may be advised. The plea therefore is that the promissory note ceased to have any force after the matter was finally settled and in any event the promissory note was executed in consideration of the criminal case being withdrawn and therefore is unenforceable. The lower appellate Court found that the promissory note was executed "as a security on which alone the civil suit and the criminal case would have to be closed up", that after the execution of the agreement Ex. V it was superseded and therefore the plaintiff is not entitled to sue on the note. In regard to the plea that the suit promissory note was executed to stifle the criminal prosecution he held in favour of the plaintiff on the ground that the object was to settle the civil dispute and not to compound the criminal offence. Mr. Satyanarayana Rao on behalf of the plaintiff attacks the finding of the learned Judge in regard to the supersession of the note. There can be no doubt that the case with which the plaintiff came to Court, namely, that Rs. 500 was paid on the date of which the promissory note was executed was false. It has also been found by the lower appellate Court that no money was actually paid by the plaintiff in respect of the said promissory note. It seems to be clear from the evidence that negotiations for settlement of both the civil dispute and the criminal liability were on foot sometime prior to the actual execution of the promissory note and that a draft agreement was written on or about the 28th July, 1924. Ex. B is a letter which was written by the defendant Seshadri to D. W. 4, a pleader who appears also to be a relation of the plaintiff. In that letter he clearly states that he has given the plaintiff the draft agreement which D.W. 4 wrote,

Veerayya *v.* Sobhanadri.

that he is sending the promissory note post-dated and directs D.W. 4 to give the note and a sum of Rs. 200 to plaintiff after taking the agreement. He also makes it distinctly clear that though the promissory note mentions interest, interest was not to be charged, that the understanding should be that the amount payable will be paid in a year. He also desired him to get this understanding confirmed. From this letter it is therefore clear that there was no final settlement arrived at. In fact it was only on the 16th August, 1924, that the parties came to a definite understanding by the execution of Ex. V. According to Ex. V, Rs. 700 should be paid in full settlement of the claim which the vendees had against the defendant, Rs. 200 to be paid immediately and Rs. 500 within one year from the said date to the plaintiff on behalf of the vendees and that the payment should be endorsed on the back of the agreement itself and a receipt obtained therefor; if default is committed Rs. 200 should be appropriated towards the expenses of criminal proceedings and the vendees should be at liberty to take such civil proceedings as they may be advised in the matter. No reference was made to the promissory note at all and in fact this agreement was attested by the plaintiff himself. There can be no doubt that Ex. V was the final and concluded agreement between the parties and the rights of the parties must be regulated according to the terms of the said agreement. If the promissory note should be treated as subsisting in spite of this agreement it will be inconsistent with the terms thereof because according to the promissory note the plaintiff would be entitled to enforce it at any time he chose and realise interest, whereas according to Ex. V payment should not be made for a year and interest should not be charged. Further if it was intended that the liability under the promissory note should be enforced there is no meaning in the agreement providing that in default of payment of Rs. 500 within a year the parties can have recourse to such civil proceedings as they may be advised, *i.e.*, the liability of the defendant is not limited to the sum of Rs. 500; it may be more or it may be less according to the damage sustained by the vendees. The intention of the parties seems to be that on the execution of Ex. V the liability under the promissory note should be treated as not subsisting. Even though it may be said that originally it was intended that a promissory note should be given, in view of the further terms imposed by the defendant according to Ex. B the parties

Veerayya *v.* Sobhanadri.

thought of arriving at the final settlement which they did in Ex. V.

Even if I am not right in this view it seems to me that the plea taken by the defendant that the promissory note was unenforceable under S. 23 of the Indian Contract Act must prevail. On the 4th August, 1924, when the promissory note was executed and sent with the date 6th August, 1924, there was admittedly a criminal prosecution pending which the defendant was anxious to get rid of. It seems to be also clear from Ex. B that the plaintiff expected that the said case will be withdrawn even on the 6th August, 1924. The last sentence in that letter clearly indicates it. It runs thus:

"He said that he would get the case withdrawn, etc., on the 6th August, 1924, itself. Please get it arranged that it is withdrawn on that day itself. Kindly render this help without fail. Please reply".

It is thus apparent that the object of sending the promissory note was to enable the case being withdrawn on the faith of it. Again Ex. V also indicates that the sum of Rs. 700 was in settlement of all the disputes between the parties not only the adjustment of the civil liability but the dropping of the criminal prosecution. No doubt Ex. V does not specifically state so but it is very clear from the concluding portion of Ex. V which provides in case of default of payment of Rs. 500 within a year Rs. 200 should be appropriated towards the expenses of the criminal case. In fact the criminal case was withdrawn on 16th August, 1924, the date of Ex. V. Mr. Satyanarayana Rao relied upon a number of cases to show that where a transaction between the parties involves a civil liability as well as a criminal offence, a settlement of the civil liability is not vitiated by the fact that the criminal prosecution is also withdrawn. But I think the true rule is that where there is an existing debt or an obligation a creditor is not precluded from taking any security therefor by threat of a criminal prosecution and the security is not vitiated by the fact that he was induced to abstain from prosecuting the debtor. But if it is a part of the bargain that the creditor should not prosecute the debtor, the security taken for the debt will be invalid. In *Jones* v. *Merionethshire Permanent Benefit Building Society*[1], Lindley, L.J., points out:

"In order to amount to a defence on the ground of illegality there must be an agreement not to prosecute—an agreement as it is called to stifle a prosecution".

1. (1892) 1 Ch. D. 173.

Veerayya *v.* Sobhanadri.

And, as Bowen, L.J., points out reparation for an obligation is a duty which the offender owes quite independently of his fear of prosecution or otherwise, and it would be absurd to lay down as an impossible counsel of perfection that the obligee or the relatives of an offender and his friends are not justified in making reparation to the party injured. But what he emphasises is that the abstention from or the dropping of the criminal prosecution should not be made a matter of bargain. He observes:

"I agree with what Mr. Reid said, that the law certainly is not anxious to discourage reparation. But you must come back after reparation made to the one dominant test in each case. It is a circumstance which may be lawfully taken into consideration that the offender has done his best himself, or with the assistance of his friends, to make good his wrong. But the test is, what is the moral duty of the person who has been injured to himself and others? He must make no bargain about that. If reparation takes the form of a bargain, then, to my mind, the bargain is one which the Court will not enforce".

Therefore the test in each case is, did it form part of a bargain, namely, the dropping of the criminal prosecution? In this case there can be no doubt that the object of the execution of the promissory note was the dropping of the criminal prosecution. It is enough if it formed part of the bargain. It need not have been the sole bargain. I think this is made clear by the recent decision of the Privy Council in *Kamini Kumar* v. *Birendra Nath*[1]. There was a dispute as to title to a property. In regard thereto there was also a criminal prosecution launched. One of the parties was very anxious to have this criminal prosecution withdrawn. Then there was a reference to arbitration and an award thereupon and the civil dispute settled and the criminal prosecution was in consequence withdrawn. It was found that the object of this reference and the award was to bring about a reconciliation including the dropping of the prosecution. Their Lordships during the course of the judgment observe:

"The real question involved in this appeal on this part of the case is whether any part of the consideration of the reference or the ekrarnama was unlawful and if it was an implied term of the reference or the ekrarnama that the complaint would not be further proceeded with, then in their Lordships' opinion the consideration of the reference or the ekrarnama, as the case may be, is unlawful".

Their Lordships also point out that the agreement need not specifically state that part of the consideration was an agreement to settle the criminal proceedings but it is enough

1. (1930) 59 M.L.J. 82: L.R. 57 I.A. 117: I.L.R. 57 Cal. 1302 (P.C.).

to give evidence from which the inference necessarily arises that a part of the consideration is unlawful. In this case the evidence makes it clear that part of the consideration was the dropping of the criminal prosecution in which all the vendees were interested. The decisions relied on by Mr. Satyanarayana Rao are all distinguishable. He relied strongly on *Flower* v. *Sadler*[1]. In that case no prosecution was launched or dropped, but there was a threat to take criminal proceedings and by means of that threat promissory notes were obtained in respect of a debt justly due. Therefore it was rightly pointed out a threat to prosecute does not necessarily vitiate a subsequent agreement by the debtor to give security for a debt which he justly owes to his creditor. Even in that case if there had been an agreement not to prosecute the decision would have been different. The next case relied on by him is *Dwijendra Nath Mullick* v. *Gopiram Gobindaram*[2]. It is not necessary to consider whether the actual decision can be supported but that decision does not conflict with the principle which I have stated. Mukerji, J., at page 62 states:

"There is nothing to prevent a creditor from taking a security from his debtor for the payment of a debt due to him, even if the debtor is induced to give the security by a threat of criminal proceedings, so long as there is no agreement not to prosecute".

But he found in that case that the consideration or the object of the agreement was not the withdrawal of the criminal case. On that finding the decision may be correct. Mr. Satyanarayana Rao laid considerable emphasis on the decision of Jackson, J., in *Narasimhulu Naidu* v. *Naina Pillai*[3]. But that case can be distinguished on the following observation by the learned Judge:

"There is nothing against public policy if a person accused of breach of trust or misappropriation chooses to acknowledge the liability and refund the amount. And if after receiving the amount the complainant withdraws from the prosecution of his complaint it need not necessarily be presumed that there was a contract that he should do so".

It seems to me that if the learned Judge was of opinion that there was a contract to withdraw the prosecution, he would have decided the case differently. Therefore it is unnecessary to deal with some of the observations of the learned Judge which I think are not relevant for the decision of this case. There can be no doubt that in this case the offence must

---

1. (1882) 10 Q.B.D. 572. 2. (1925) I.L.R. 53 Cal. 51.
3. A.I.R. 1929 Mad. 7.

Veerayya v. Sobhanadri.

be deemed to be non-compoundable as the permission of the Court to compound was not obtained. Part of the consideration for the promissory note was the agreement to withdraw the criminal prosecution and therefore the promissory note is unenforceable.

In the result the second appeal fails and is dismissed with costs.

Leave refused.

S. V. V. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE MOCKETT AND MR. JUSTICE HORWILL.

The Chairman, Municipal Council,
Rajahmundry .. *Petitioner* (Petitioner)*

v.

Nyapathi Subba Rao .. *Respondent (Plaintiff).*

Chairman, Municipal Council, Rajahmundry *v.* Subba Rao.

Madras District Municipalities Act (V of 1920)—Profession tax—Payment of, on service of demand notice—Notice stating that in default of payment, his property will be distrained—No "express protest"—If payment one under protest.

Where an assessee paid the profession tax demanded from him without any *express protest* accompanying the payments, the fact that the payments were made in pursuance of the usual demand notice served on him, which stated that in default of payment his property will be distrained, does not make the payment an involuntary payment and therefore no suit will lie to recover such payments.

What is or is not a voluntary payment discussed.

The Municipal Council, Tuticorin v. *Ralli Brothers,* (1933) 67 M.L.J. 566, approved.

Petition under S. 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the Subordinate Judge of Rajahmundry in S. C. S. No. 210 of 1930.

P. V. Rajamannar and *K. Subba Rao* for Petitioner.

N. Rama Rao and *P. Panini Rao* for Respondent.

The Court delivered the following

Mockett, J.

JUDGMENTS. *Mockett, J.*—The petitioner is the Municipal Council, Rajahmundry, by its Chairman and the respondent is said to be a gentleman who is a large land-owner and who also does considerable money-lending business. He sued the Municipal Council for refund of payment of profession tax for the periods 1926 to 1930.

---

* C. R. P. No. 1630 of 1931. .. 19th January, 1937.

Before us, the only point for decision, which goes to the root of the whole matter, is this. It is contended by the learned counsel for the Municipality that this suit does not lie because the payments sought to be recovered were voluntary payments and such voluntary payments being in the nature of a gift cannot be recovered. The following history of this case is relevant. With regard to the two half-years 1926-1927, the respondent filed appeals before the appellate authority which were disposed of on the 18th January, 1928, summarily. He apparently being dissatisfied with those decisions continued to pay this tax from that time until 1930 and filed this suit in July, 1930. No protest accompanied the payments, but the learned Judge has found on the facts that the payments were made under protest and ordinarily in a revision petition even under S. 25 of the Provincial Small Cause Courts Act we should not go behind any questions of fact. But this is a matter of some importance and on the face of the judgment it is perfectly clear to us that these payments were voluntary in the sense that word is understood in a matter of this sort and that so far from showing that they were made under protest the very circumstances set out by the learned Judge emphasise that they were voluntary payments. It is quite clear that the respondent preferred the procedure provided by the Act by way of appeal and however dissatisfied with the result he thought fit to go on making payments for four years until he was inspired with the idea of filing this suit four years after, in 1930. He has relied on the fact that the notice states that in default of payment, his property will be distrained. The whole question of what is and is not a voluntary payment has been exhaustively considered by Pandalai, J., in the case of *The Municipal Council, Tuticorin* v. *Ralli Brothers*[1]. I desire to record my complete agreement with that part of his judgment dealing with that particular topic where it will be seen that the principal cases are considered. One decision should be specially referred to and that is *Maskell* v. *Horner*[2] where the Court of Appeal reversing the decision of Rowlat, J., dealt with the question of voluntary payments. Dealing with the question of compulsion Lord Reading, C. J., at page 118 says:

"If a person pays money, which he is not bound to pay, under the compulsion of urgent and pressing necessity or of seizure, actual or threatened, of his goods he can recover it as money had and received".

1. (1933) 67 M.L.J. 566 at 569 to 573.
2. (1915) 3 K.B. 106.

Chairman, Municipal Council, Rajahmundry *v.* Subba Rao.

Mockett, J.

It will be observed that the compulsion is of urgent and pressing necessity or of seizure, actual or threatened. As to what is actual or threatened seizure, Cave, J., in the case of *Slater* v. *Mayor, etc., of Burnley*[1], points out that threatened seizure does not apply to the conventional threat contained in the ordinary notices of demand because, as he says:

"If that were so, no payment of rent to a landlord would be a voluntary payment".

It is evident that the threat must be a real threat operating on the mind of the payer without which he would not have paid. I do not think that description can be made to apply to many of the formal documents which are sent to people demanding payment. In my view generally as to this topic it is in each case a question of fact as to whether the payment was or was not voluntary, and in the case before us, it is perfectly clear that not only is there no evidence that the payment was under protest and involuntary but that the opposite was the fact, namely, that it was made voluntarily. That being so, it is unnecessary to consider any of the other points raised in this petition which in my judgment should be allowed with costs.

Horwill, J.

Horwill, J.—I agree.

S. V. V. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Abdur Rahiman Kutty and others .. *Petitioners* (Accused Nos. 1 to 4).*

Abdur Rahiman Kutty, *In re.*

Child Marriage Restraint Act (XIX of 1929), S. 8—Criminal Procedure Code (V of 1898), S. 10 (2)—Whether Additional District Magistrate has jurisdiction to try cases arising under the Act.

There can be no doubt that if S. 8 of the Sarda Act makes it clear that Additional District Magistrates should not try cases under the Act, then the mere fact that an Additional District Magistrate is empowered with all the powers of a District Magistrate under S. 10 (2) of the Criminal Procedure Code would not empower him to try a case under the Sarda Act; but it is a well-known canon of interpretation that two statutes should be reconciled if they can be. It may be noted that no reference is made to S. 10 of the Code in S. 8 of the Sarda Act. One would have expected S. 10 to have been coupled with S. 190 of the Code to which reference is made, if the legislature had intended to exclude the jurisdiction of an Additional District Magistrate. Reading therefore S. 8 of the Sarda Act with S. 10 (2) of the Criminal Pro-

---

1. (1888) 59 L.T. 636 at 639.

* Cr. R. C. No. 362 of 1936. 3rd February, 1937.
Cr. R. P. No. 333 of 1936.

cedure Code, it is to be held that an Additional District Magistrate who had been given all the powers of a District Magistrate is empowered to try cases under the Child Marriage Restraint Act also.

Maria Pillai v. *Gopalakrishna Aiyar*, (1928) M.W.N. 633, distinguished.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of Session of the South Malabar Division in Criminal Appeal No. 2 of 1936, preferred against the judgment of the Court of the Additional District Magistrate of Malabar in C. C. No. 1 of 1935.

K. S. Jayarama Ayyar, V. L. Ethiraj and *A. S. Sivakaminathan* for Petitioners.

K. Venkataraghavachari for *The Public Prosecutor* on behalf of the Crown.

The Court made the following

ORDER.—The only question in this Criminal Revision Case is whether an Additional District Magistrate is empowered under S. 8 of the Sarda Act (Child Marriage Restraint Act XIX of 1929) to try cases under that Act. The District Magistrate took cognisance of the case but transferred it to the Additional District Magistrate for trial; and it is contended that the District Magistrate could not do so, but was bound to try the case himself, even though the Additional District Magistrate was given under S. 10 (2) of the Code of Criminal Procedure all the powers of a District Magistrate.

There can be no doubt that if S. 8 of the Sarda Act makes it clear that Additional District Magistrates should not try such cases, then the mere fact that an Additional District Magistrate is empowered with all the powers of a District Magistrate under S. 10 (2) of the Criminal Procedure Code would not empower him to try a case under the Sarda Act; but it is a well-known canon of interpretation that two statutes should be reconciled if they can be. I agree with Mr. Jayarama Aiyar that an Additional District Magistrate is not a District Magistrate. S. 10 (3) of the Code makes an Additional District Magistrate subordinate to the District Magistrate, so that the District Magistrate has certain powers under S. 520 of the Criminal Procedure Code, for example, over the Additional District Magistrate. The question is, however, whether S. 8 of the Sarda Act intended to exclude trial by Additional District Magistrates. In reading that section it has to be assumed, unless the contrary is quite clear, that it was not intended to

Abdur Rahiman Kutty, *In re.*

take away the powers given to the Additional District Magistrates under S. 10 (2) of the Code.

Section 8 reads:

"Notwithstanding anything contained in S. 190 of the Criminal Procedure Code, 1898, no Court other than that of a Presidency Magistrate or a District Magistrate shall take cognisance of or try any offence under this Act."

It may be noted that no reference is made to S. 10 of the Criminal Procedure Code. One would have expected S. 10 to have been coupled with S. 190 if the legislature had intended to exclude the jurisdiction of an Additional District Magistrate. If this section had been worded positively, merely empowering District Magistrates to take cognisance of offences under the Act, the present argument would probably never have been put forward; for nowhere in any act are Additional District Magistrates coupled with District Magistrates; so that where District Magistrates are given any powers those of the Additional District Magistrates are presumed. A handle for the present contention is afforded by the fact that the section reads more strongly in the negative form:

"No Court other than a Presidency Magistrate or a District Magistrate shall take cognisance of or try any offence under this Act".

This negative form is necessitated by the opening words of the section.

"Notwithstanding anything contained in S. 190 of the Criminal Procedure Code."

Had it not been for these words a Sub-Divisional Magistrate or a Magistrate specially empowered could have taken cognisance of the offence under S. 190 of the Code. In order to prevent these officers from taking cognisance of an offence under S. 190, Criminal Procedure Code, it was necessary to word S. 8 of the Sarda Act so as to limit the taking of cognisance and trial to the other Magistrates mentioned in S. 190 of the Criminal Procedure Code, *viz.*, Presidency Magistrates and District Magistrates. S. 8 of the Sarda Act makes no mention of Additional District Magistrates because S. 190, Criminal Procedure Code, does not.

I do not therefore find any difficulty in reading S. 8 of the Sarda Act with S. 10 (2) of the Criminal Procedure Code and holding that an Additional District Magistrate who has been given all the powers of a District Magistrate is empowered to try a case under the Sarda Act also.

Abdur Rahiman Kutty, *In re.*

My attention has been drawn to the judgment of Reilly, J., in *Maria Pillai* v. *Gopalakrishna Aiyar*[1]. After a trial by a Sub-Magistrate, stolen property was handed over to the accused. An appeal was preferred by the complainant to the Sub-Divisional Magistrate, who passed an order returning it to the complainant. In revision it was held by a Full Bench that an appeal lay only to the District Magistrate and that the Sub-Divisional Magistrate had no jurisdiction. The case then went back to the District Magistrate, who transferred it to the Additional District Magistrate. The matter again came before this Court in revision and Reilly, J., passed the following order:

"Following the opinion of the Full Bench I must hold that the Additional District Magistrate had no jurisdiction to hear the appeal. His order is therefore set aside. The appeal is transferred to the District Magistrate."

It is seen that Reilly, J., gave no reason at all for his order; but he apparently felt himself bound by the actual words used by the Full Bench that it was only the District Magistrate who could hear the appeal. The Full Bench certainly did not decide that an Additional District Magistrate specially empowered could have heard the appeal.

This petition is accordingly dismissed.

K. C. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VARADACHARIAR.

Tadikonda Ramakrishna Rao and another .. *Appellants** (*Plaintiffs*)

v.

Kottagundu Subba Rao .. *Respondent* (*Defendant*).

Rama-krishna Rao *v.* Subba Rao.

Sale—Tenant of a portion of a house belonging to two brothers—House, an item of joint family property—Sale of the undivided portion of one brother to the tenant—Suit for rent by the other brother—Suit for partition of the purchased share by the vendee—Whether vendee liable to pay rent—Whether any suit in the alternative for damages will lie.

The defendant was induced to make some capital out of the differences between two undivided brothers and purported by a sale deed to purchase a half share of the younger brother in a joint family house. After the sale deed the plaintiff who was the elder brother purported to transfer to his wife the eastern portion of the house treating it his own property and later the wife sent a notice to the defendant asking him to quit the portion of the house in his occupation. The defendant replied that he did not propose to wait till that

---

1. (1928) M.W.N. 633.

* S. A. No. 1271 of 1932. 11th November, 1936.

Rama-krishna Rao *v.* Subba Rao.

date but, as, from the date of his purchase from the younger brother of his half-share in the house he had in law become a co-owner of the house, there was no longer any relationship of landlord and tenant between themselves. Plaint claim was that the defendant was bound to pay rent as from the date but alternatively the claim was also for one of damages for use and occupation. A rent suit was first filed. Thereafter the defendant filed a suit for partition of the suit house. The two suits were tried together. The partition suit was decided on the basis that there was no previous partition between the brothers and hence the elder brother was not entitled in his own right to the eastern portion. It became final. Proceeding on this basis the lower Courts decided in the rent suit that for the period before the sale deed, the defendant was liable for a small amount of rent.

Held, (1) that no question of merger or apportionment would arise in this case as it was not the plaintiff's case that the defendant was a tenant of the whole house.

Faqir Bakhsh v. *Murli Dhar,* (1931) 61 M.L.J. 261: L.R. 58 I.A. 75: I.L.R. 6 Luck. 197 (P.C.), distinguished.

(2) That in the face of the notice and reply between the parties it would be impossible to treat the parties as continuing to retain the relationship of landlord and tenant after the date of the reply notice from the defendant.

(3) In the light of the decision of the partition suit that the defendant was entitled to a half-share, the defendant could not be held liable for damages. It would be one thing to say that he could have been ejected and that his only right was to sue for partition, but it would be a different thing to make him liable for mesne profits as a person in possession without title.

Appeal against the decree of the Court of the Subordinate Judge (Additional) of Masulipatam in Appeal Suit No. 14 of 1932 (A. S. No. 234 of 1931, District Court, Kistna) preferred against the decree of the Court of the District Munsif of Gudivada in O. S. No. 407 of 1929.

K. Umamaheswaran for Appellants.

P. Satyanarayana Rao for Respondent.

The Court delivered the following

JUDGMENT.—This second appeal arises out of a suit for rent. The appellants are husband and wife but it will be convenient to refer to the husband who is the first plaintiff as the plaintiff. He has a brother named Hanumantha Rao and the arrangement made by the defendant with Hanumantha Rao for the purchase of the latter's undivided half share in the suit house has been the cause of differences and disputes between the parties.

It is admitted by the defendant that, to begin with, he was a tenant of the *whole* of the suit house under the plaintiff who at that time is said to have acted on behalf of himself and of his brother Hanumantha Rao. Later on, however, it seems to be common ground that the defendant was a tenant only of

Rama-krishna Rao v. Subba Rao.

the eastern portion of the house, which is referred to as portion *A* in the plan. It also appears from the evidence that for some years, up to 1925, the western portion was in the occupation of another tenant, but it is stated that the western portion was much less commodious and as it also got into disrepair it was apparently not continued to be occupied by anybody. The latest registered lease between the parties seems to have been entered into in 1918 for a period of two years, but though its term expired in 1920 the defendant admits having continued in occupation of the eastern portion presumably on the same terms as under Ex. A, till October, 1926. The plaint alleged that during the interval there was a fresh arrangement for payment of enhanced rent but apparently that allegation has not been persisted in.

The dispute between the plaintiff and his brother is said to have been the result of an attempt on the plaintiff's part to treat the eastern portion of the house which is said to be the better portion of the property as having become his own and trying to force the western portion on the brother; while the brother contended that both of them were undivided and that plaintiff was not entitled exclusively to the eastern portion. The defendant apparently was induced to make some capital out of these unfortunate differences between the brothers and purported to purchase Hanumantha Rao's undivided half share in the suit property. After the defendant obtained this sale deed from Hanumantha Rao, the plaintiff on 1st November, 1926, purported to transfer to his wife the eastern portion of the house treating it as his property and on 19th November, 1926, the wife sent a notice, Ex. V, to the defendant asking him to quit the house on 15th January, 1927. The defendant promptly replied by Ex. V-A stating that he did not even propose to wait till 15th January, 1927, but as from the date of his purchase from Hanumantha Rao he had in law become a co-owner of the house, there was no longer any relationship of landlord and tenant between themselves. He no doubt says that the sale by the plaintiff to his wife was collusive and nominal, but it certainly does not lie in the plaintiff's mouth to say that it was not open to the wife to give that kind of notice.

The claim in the plaint was that the defendant was bound to pay rent as from 30th August, 1926, but alternatively the claim was also put forward as one for damages for use and occupation. The written statement raised the plea foreshadow-

Rama-krishna Rao v. Subba Rao.

ed in the reply notice, Ex. V-A. It was also stated that rent had in fact been paid to the plaintiff up to 31st October, 1926. The rent suit was in the first instance filed in the Masulipatam Sub-Court as a Small Cause suit. Within five or six weeks after its institution, the defendant on the strength of the sale-deed obtained by him from Hanumantha Rao filed a suit for partition of the suit house in the District Munsiff's Court. The rent suit was accordingly transferred to the Munsiff's Court and the two suits were tried together.

In the partition suit both the Courts upheld the plea that there was no partition between the brothers, that the present plaintiff was therefore not entitled in his own right to the eastern portion of the suit house and that the present defendant was entitled to have the house partitioned between himself and the plaintiff. I understand that that decree has now become final. Proceeding on the above basis, the Courts below have held that after 10th November, 1926, the defendant was in possession as a co-owner and not as a tenant nor as a trespasser and that therefore he was not liable to pay any rent or damages to the plaintiff. A decree was given for a small sum representing the rent between 31st October, 1926, and 10th November, 1926. The plaintiff has filed this second appeal claiming that he is entitled to rent even in respect of the period subsequent to 10th November, 1926.

On behalf of the appellants, three contentions have been urged before me. It was first contended that the purchase by the defendant from Hanumantha Rao will not bring about a merger of the leasehold and the vendee's interest because the purchase was only of a half share. Reliance was placed in support of this contention on the decision of the Judicial Committee in *Faqir Bakhsh* v. *Murli Dhar*[1]. As a proposition of law there can be little doubt that if a person is a tenant of the whole of a property the acquisition by him of ownership in a portion thereof will not of itself extinguish the leasehold interest. In the Lucknow case *Faqir Bakhsh* v. *Murli Dhar*[1] the tenant was sought to be treated as having forfeited the tenancy and incurred liability to account for the full profits of the property to his co-sharers. The facts stated in the judgment show that he had a *term* lease and the tenant insisted that as long as the term lasted his co-shares must only be deemed to have

1. (1931) 61 M.L.J. 261: L.R. 58 I.A. 75: I.L.R. 6 Luck. 197 (P.C.).

purchased the right to receive the rent and there was no distinction of the lease by merger. I do not see how that question arises in the present case. Apart from the doctrine of merger, if this was a case in which the defendant held possession of the *whole* house as lessee, it may be open to the plaintiff to contend that after the purchase by the lessee of a half share in the house the defendant should continue to pay to the plaintiff a proportionate share of the rent in respect of the other half on the principle laid down in S. 37 of the Transfer of Property Act. But as I have already stated it is not the plaintiff's case that the defendant was a tenant of the whole house. No question therefore of merger or apportionment arises in the case.

The next contention on behalf of the appellant's was based upon the observations in Mulla's Hindu Law, page 295, etc., with reference to the rights of a purchaser of an undivided share in an item of joint family property from a coparcener. The learned author points out the different views obtaining in the various High Courts as to the right of such a purchaser to obtain possession or to remain in possession. Here again it is unnecessary for me to express any opinion on the point on which there is so much divergence of judicial opinion. For one thing, the plaintiff in this case all along insisted that he was entitled to a portion of the house *exclusively*, there was accordingly no question of his claiming to recover the house *for the family*. Again Sir D. F. Mulla himself points out that even in cases in which a decree for ejectment has been given against the purchaser in possession it has been the practice to grant a stay of execution till the purchaser files a suit for partition of the property in which he has purchased a share. As I have observed already, a partition suit was instituted in the present case within five or six weeks of the institution of the rent suit.

So far as the claim to recover rent is based upon the defendant's character as tenant, it is difficult to see how it could be maintained that the defendant occupied that status in the face of the notices, Exs. V and V-A. By Ex. V the plaintiff's wife presumably with the knowledge of the plaintiff purported to terminate the tenancy by notice to quit as from 15th January, 1927. As the original period of the registered lease had long ago terminated, the defendant has been in

Rama-krishna Rao v. Subba Rao.

possession subsequent to 1920 only as a tenant from month to month. If the defendant had acquiesced in Ex. V it will be impossible to treat him as in the position of a tenant after January, 1927. But he was prepared to throw up his tenancy even on an earlier date as shown by Ex. V-A and he relied on his title by purchase. Whether that purchase entitled him to remain in possession or not is another matter but in view of Exs. V and V-A it is impossible to treat the parties as continuing to retain the relationship of landlord and tenant after that date.

As for the alternative claim for damages for use and occupation, I do not see how in the face of the finding in the partition suit that the present defendant was entitled to a half share in the house the defendant could be held liable for damages. It is one thing to say that he could have been ejected and that his only right was to sue for partition but it is a different thing to make him liable for mesne profits as a person in possession without title, and as I have stated already the partition suit was filed very shortly after the institution of the suit for rent.

Lastly, the appellant's learned counsel suggested that as the eastern portion, that occupied, by the defendant, represented more than a half share which the defendant would have been entitled to, the plaintiff was entitled to claim some payment as from a co-owner who has received a larger share of the profits than he would be entitled to. The authorities no doubt recognise that if a co-owner makes profits by the use of common property he is accountable to the other co-owner for the profits made by him in excess of his share, but no authority has been brought to my notice in which a co-owner in possession can merely on the ground of his possession be made liable to pay an occupation rent to his co-owners. It is not suggested that the plaintiff wanted to occupy the property and was prevented from so doing by the defendant.

In these circumstances I do not see any reason to differ from the conclusion reached by the Courts below. The second appeal fails and is dismissed with costs.

Though points of law have been attempted to be argued before me I am not satisfied that they really arise on the facts. I therefore refuse leave to appeal.

K. C. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW.

Ganesa Naidu and others .. *Appellants** (*Defendants*)

v.

C. Mallaram Singh .. *Respondent* (*Plaintiff*).

Ganesa Naidu *v.* Mallaram Singh.

Madras City Tenants Protection Act (III of 1922), Ss. 3, 4, 5 and 11—Purchase of superstructure from tenants in execution—Suit for ejectment—Decision that leasehold right inhered in the tenants—Later purchase by the same purchaser of the site also from owner—Second suit for ejectment and recovery of possession of both site and superstructure—Notice of three months' time to tenants not given—Suit not maintainable.

The plaintiff purchased a site in the City of Madras from its owner but the defendants were the tenants of the superstructure on the suit site from whom the plaintiff himself had in execution of a Small Cause Court's decree purchased it some months earlier. The plaintiff therefore claimed to be the owner of the house as well as the site, and on the strength of his ownership claimed to recover possession of both. In pursuance of the purchase in Court auction of the superstructure, the plaintiff had instituted a previous suit for ejectment against the tenants (defendants). In that it was held that the plaintiff had not become, by reason of the purchase of the superstructure, the purchaser of the lease hold right of the defendants and that his only right was to pull down the superstructure and take away the materials. As no appeal was filed against it, that finding became *res judicata* in the present suit for ejectment and recovery of both site and superstructure. The question for decision arising whether the suit was maintainable in the circumstances for want of proper notice to the defendants,

Held, (1) that the defendants were tenants as defined in S. 11 of the Act and though the superstructure was sold away by them, the tenancy of the defendants was not terminated.

(2) By virtue of the decision in the former suit it should be held to have been established between the parties that the leasehold right inhered in the defendants in spite of the sale of superstructure.

(3) The sale of superstructure had not the effect in law of changing the nature of the tenancy from a tenancy under the Act into an ordinary tenancy to which the Act did not apply, for the Act nowhere contemplates any change in a tenancy, to which it applies, being brought about except in accordance with the provisions of the Act.

(4) Whether the right to get compensation under Ss. 3, 4 and 5 or to purchase the land exists or not, the tenancy under the Act remains, at least so far as S. 11 of the Act is concerned, which gives the tenant the benefit of three months' notice instead of a shorter time under the ordinary law.

(5) In the absence of a notice under S. 11 of the Act the suit was not maintainable.

Appeal against the decree of the Court of the City Civil Judge, Madras, in O. S. No. 783 of 1934.

C. Sarangarajan and *G. T. Ramanujachari* for Appellants.

K. Gopalaswami for Respondent.

---

* C. C. C. Appeal No. 35 of 1935. 17th April, 1936.

Ganesa Naidu v. Mallaram Singh.

The Court delivered the following

JUDGMENT.—This is an appeal from the decree of the City Civil Judge, Madras, dated 2nd February, 1935, in O. S. No. 783 of 1934 a suit for ejecting the defendants and for recovery of possession of the plaint property. According to the plaintiff the site on which the plaint superstructure stands belonged to one Abdul Huq and the defendants were the tenants of the site who had put up the suit superstructure thereon and were paying a rent of Rs. 1-13-0 per month. The plaintiff purchased the site from Abdul Huq on 15th October, 1934. Some months earlier in execution of a decree of the Small Causes Court the superstructure belonging to the defendants had been sold and purchased by the plaintiff himself on 5th May, 1934. The plaintiff therefore claimed to be the owner of the house as well as the site and on the strength of this title to the house and the site he claimed to recover possession of both. The superstructure was purchased by the plaintiff on 5th May, 1934, and immediately thereafter on the strength of this purchase, in Court-auction, of the superstructure, he instituted a suit for ejecting the defendants, namely, O. S. No. 346 of 1934. In that suit the lower Court held that the plaintiff had not become, by reason of the purchase of the superstructure, the purchaser of the leasehold right of the defendants and that his only right was to pull down the superstructure and take away the materials. That finding is *res judicata* as no appeal was filed from the judgment of the lower Court in that suit, and it may be mentioned here that it was only a few days before the judgment in that suit was pronounced that the site itself was purchased by the plaintiff on 15th October, 1934. It is clear therefore that the plaintiff is not entitled by reason of his purchase of the superstructure in Court auction in execution of a Small Cause Court decree, to eject the defendants and his claim to eject the defendants must therefore be rested on the rights which he acquired by reason of the purchase of the land itself from the owner Abdul Huq.

This is indeed clear from a consideration of S. 28 of the Presidency Small Cause Courts Act. In any case the matter is now *res judicata* by reason of the decision of the lower Court in O. S. No. 346 of 1934. A number of issues were framed by the lower Court in the present suit and the suit was

Ganesa Naidu *v.* Mallaram Singh.

decreed, all the issues being found against the defendants and in favour of the plaintiff.

In the present appeal by the defendants it is sufficient to consider only one question, namely, the question covered by issue No. 2 in the Court below which runs as follows:—

"Is the suit not maintainable for want of proper notice ?"

In order to determine this question it is necessary to decide whether the defendants are tenants as defined by the Madras City Tenants Protection Act (III of 1922), because it is only under S. 11 of that Act that three months' notice is required to be given before a suit for ejectment can be instituted against the tenant as defined in the Act. The word 'tenant' is defined in that Act as follows:—

" 'Tenant' means tenant of land liable to pay rent on it, every other person deriving title from him, and includes persons who continue in possession after the termination of the tenancy".

There can be no doubt that the defendants are 'tenants' as defined above, and this cannot be seriously questioned. They are tenants of land and the fact that the superstructure put up by them was sold in Court auction does not terminate their tenancy. It cannot be pretended that because the superstructure is sold or burnt down the tenancy ceases to exist, or that the tenancy under the Act becomes an ordinary tenancy. By virtue of the decision in the former suit O.S. No. 346 of 1934, it must be held as established between the parties that the leasehold right of the defendants still inheres in the defendants in spite of the sale of the superstructure. In other words it is clear, that the defendants continued to be tenants even after the sale of the superstructure. This is *res judicata*. They were tenants within the meaning of the Act before the sale, and I do not see how it can be contended seriously that the sale of the superstructure has the effect in law of changing the nature of the tenancy from a tenancy under the Act into an ordinary tenancy to which the Act does not apply.

The Act nowhere contemplates any change in a tenancy to which it applies being brought about except in accordance with the provisions of the Act.

The learned City Civil Judge appears to think that a tenant under the Act cannot be regarded as being really a tenant under the Act if he is not entitled to get compensation under Ss. 3, 4 and 5 of the Act or is not entitled under S. 9 to compel the landlord to sell the land to him; and he concludes

Ganesa Naidu v. Mallaram Singh.

that where a tenant has no building of his own on the land he is not a tenant within the meaning of the Act. This view is in my opinion clearly wrong. It is obvious that where a tenant has no improvement or building of his own no compensation can be due to him or if he does not want to purchase the land, the question of compelling the landlord to sell the land does not arise. Whether the right to get compensation or to purchase the land exists or not the tenancy under the Act remains, at least so far as S. 11 of the Act is concerned, which gives him the benefit of three months' notice instead of notice for a shorter time under the ordinary law.

The learned City Civil Judge's view, that the spirit of the Act shows that where the tenant has no improvements he cannot claim that three months' notice should be given to him under S. 11 of the Act, is in my opinion not supported by any reason and certainly not supported by any authority. The provisions of S. 11 are certainly provisions in favour of the tenant and not in favour of the landlord, and to that extent it is one of the benefits conferred on the tenants by the Act, and if the defendants are tenants under the Act they cannot be deprived of the benefit of the protection given by S. 11 simply because they are not entitled to other benefits given by the Act. Even if by reason of certain circumstances other benefits conferred by the Act may not be available to them there is no reason to deny such benefits as are available to the tenant under the Act.

I have therefore no doubt that this question, namely, whether the defendants are tenants within the meaning of the Act must be answered in the affirmative. S. 11 of the Act provides that no suit in ejectment shall be instituted until after the expiration of three months after notice in writing has been given requiring the tenant to surrender possession. That such notice has not been given in the present case is admitted and therefore this suit for ejectment is not maintainable, and on this ground alone the appeal has to be allowed. It is therefore unnecessary to consider the question whether if the suit were maintainable the defendants would be entitled to proceed under S. 9 of the Act. The decree appealed from is set aside and the suit is dismissed with costs in this Court and in the Court below.

K. C. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATRAMANA RAO.

R. Ganesa Aiyar .. *Petitioner** (*Plaintiff*)

v.

The Lakshmi Co-operative Building Society by Secretary R. S. Ramachandra Aiyar (*Vide* Order dated 27th August, 1935, on C.M.P. No. 2843 of 1935) .. *Respondent* (*Defendant*).

Ganesa Aiyar *v.* Lakshmi Co-operative Building Society.

Co-operative Society—Honorarium—Secretary of a Building Society claiming a share of the net profits under a by-law of the Society—By-laws of the Society—Under what circumstances would he be prevented from claiming it.

Where the Secretary of a Co-operative Building Society, Limited, claimed remuneration Rs. 200 odd for services rendered by him to the Society for the year 1928-1929 and a portion of the year 1929-1930 and the general body refused to sanction the amount, but by the by-law 60 (2) of the Society it was provided that the net profits of the Society as declared by the Registrar, year after year, should be divided of which one-fourth to be paid as honorarium to the Secretary and Treasurer not exceeding Rs. 150,

Held, that the by-law distinctly provided that the profits should be distributed in accordance with that rule. It was not dependent upon the vote of the general body. It would be open to the general body to alter the by-law, but until the by-law 60 was altered, it was not open to the general body to say that and to withhold payment of one-fourth of the annual profits. So far as the amount due for 1928-1929 was concerned, there would be no question that the Secretary was entitled to it. But for the portion claimed for 1929-1930 he would be not entitled as by-law 60 only contemplated the payment of an annual lump sum, contingent on a person serving as Secretary for the entire period.

Isaacs' case, (1892) 2 Ch. 158 at 164; In re *International Co.*, 66 L. T. 253 and *Moriarty* v. *Regent's Garage Company*, (1921) 1 K.B. 423 at 447, relied on.

The meaning of 'honorarium' discussed.

Petition under S. 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of Small Causes at Trichinopoly in S. C. S. No. 4995 of 1933.

K. V. Seshayyangar for Petitioner.

Respondent not represented.

The Court delivered the following

JUDGMENT.—The question in this case is whether the petitioner is entitled to recover a sum of Rs. 242-4-0 as and for remuneration for the services rendered by him as Secretary of the defendant, The Lakshmi Co-operative Building Society, Limited, for the year 1928-1929 and a portion of the year

* C. R. P. No. 1787 of 1934. 17th December, 1936.

Ganesa Aiyar v. Lakshmi Co-operative Building Society.

1929-1930. The learned Subordinate Judge negatived his claim on the ground that the general body has refused sanction for the payment claimed by him and has therefore no right to sue therefor. It is contended before me that this view is wrong. To appreciate the contention, reference to a few by-laws of the Society is necessary. Under by-law 17 the executive management of the affairs of the Society shall vest in a Board of Directors which shall consist of not more than five members Under by-law 18 the members of the Board of Directors shall be elected by the general body for a period of two years from among the members of the Society. After the Board of Directors is elected they shall elect from among themselves a president and a secretary and treasurer. Under by-law 28 the services of the members of the Board of Directors shall be gratuitous. Under by-law 29 the ultimate authority in all matters relating to the administration of the Society shall be the general body of the members who shall meet from time to time and among other matters which may be dealt with by the general body is the amendment or repeal of any existing by-law or the enactment of a new by-law. By-law 60 provides for the distribution of profits thus: the net profits of the society as declared by the Registrar year after year shall be divided as follows: (1) one-fourth to the reserve fund; (2) one-fourth to be paid as honorarium to the secretary and treasurer not exceeding Rs. 150; (3) the remainder subject to a maximum of 9 per cent. per annum on the paid-up share capital may be declared as dividend. The dividend declared shall not be actually distributed as long as any loan is outstanding against them. The amount found due to each member shall be credited to his loan account. By-law 63 provides that no amendment to, alteration in or cancellation of a by-law nor the enactment of a new by-law shall be made except at a general meeting of the members or shall take effect until it shall have been approved by the Registrar. It will thus be seen that none but a member can hold the office of the Secretary and he must be one of the Board of Directors and that the services of the Board of Directors shall be gratuitous. This is in accordance with the general principle that the directors of a company cannot claim any remuneration unless the articles expressly provide for it. It is also clear law that if the articles provide for payment of any remuneration the director can sue for it. The question in

Ganesa Aiyar *v.* Lakshmi Co-operative Building Society.

this case is, what is the right which the Secretary has under by-law 60 for the payment of the honorarium provided therein? With reference to the right of a director to claim remuneration from a company the rule of law is thus stated by Sterling, J., in In re *Anglo-Austrian Printing and Publishing Union* (*Issac's case*)[1]:

"Where a man has accepted the office of director and acted as such, there ought to be inferred an agreement between him and the company, on his part that he will serve the company on the terms as to qualifications and otherwise contained in the articles of association, and on the part of the company that he shall receive the remuneration and all the benefits which those articles provide for directors".

To use the language of the present Master of the Rolls in *Swabey* v. *Port Darwin Gold Mining Company*[2]:

"The articles do not themselves form a contract, but from them you get the terms upon which the directors are serving".

This principle has been held to be applicable to persons who take office as directors whether members or non-members. *See* Sterling, J., in *International Cable Company*[3]. It seems to me that the same principle has to be applied in this case also. Though by-law 28 provides that the services of a director are gratuitous it does not prevent the director who holds the office of the secretary from sharing benefits which are provided by the by-laws one of which is the benefit conferred under by-law 60. But two arguments seem to have prevailed with the lower Court, namely, (1) that cl. (2) of by-law 60 says that the amount is to be paid as honorarium, and (2) that such honorarium is dependent upon the will of the general body and it was open to the general body under by-law 29 to withhold or sanction the payment of the honorarium. No doubt honorarium *prima facie* implies a gratuitous payment, but it also means a fee for services rendered. Wharton in his Law Lexicon defines "honorarium" thus:

"A recompense for services rendered; a voluntary fee to one exercising a liberal profession, *e.g.*, a barrister's fee".

In Standard Dictionary 'honorarium' is defined thus:

"A fee or payment to a professional man for services on which the custom requires that no fixed remuneration be placed, as a physician's honorarium and honorarium for literary work".

In Oxford Dictionary it is defined thus:

"Honorary reward, a fee for services rendered".

1. (1892) 2 Ch. 158 at 164.
2. (1889) 1 Megone 385.
3. (1892) 66 L.T. 253.

Ganesa Aiyar *v.* Lakshmi Co-operative Building Society.

Thus it will be seen honorarium might according to context connote a purely gratuitous payment or a fee for services rendered. It is called "honorarium" in by-law 60, cl. 2 on account of the character of the services rendered. From the mere use of the word "honorarium" it is unsafe to designate it as a gratuitous payment. In dealing with a case where the articles of association provided that a person acting as a director shall get £150 per annum, McCardie, J., made the following observations in *Moriarty* v. *Regent's Garage Company*[1] to which I can usefully refer, *viz.*:

"The question is not whether the word 'salary' is employed. It may or may not be employed. The word 'reward' or 'emolument' or 'remuneration' may be used. In each case the substance rather that the actual word is to be looked at. Here the agreement says by cl. 4 that the fees of the plaintiff for acting as director shall be £150 per annum, that is, in my view a fixed yearly remuneration for a substantial office to be held for a substantial period of time".

In this case the Secretary has a right to a yearly payment contingent on profits. Under cl. 2 he is entitled to one-fourth of the profits not exceeding a sum of Rs. 150. The by-law distinctly provides that the profits shall be distributed in accordance with that rule. It is not dependent upon the vote of the general body. The argument based on by-law 29 seems to be fallacious. It is open to the general body to alter the by-law; but until the by-law 60 is altered, it is not open to the general body to vary that by-law and to withhold payment of one-fourth of the annual profits. Thus the secretary *prima facie* will be entitled to claim payment of the profits in accordance with by-law 60 (2). It is not disputed that profits have been earned during the period of his service. In fact the Board of Directors recommended in their report that the petitioner would be entitled to Rs. 120-3-0 as remuneration for 1928-29 and Rs. 56 as remuneration for 1929-30 for the period served by him in that year. The general body, in my opinion, was not competent to withhold the payment. So far as Rs. 120-3-0 due for 1928-29 is concerned, there seems to be no question that the plaintiff is entitled to it. But will he be entitled to claim the remuneration of Rs. 56 for the broken period 1929-30? In my opinion, by-law 60 contemplates the payment of an annual lump sum contingent on a person serving as secretary for the entire period and he is not entitled to claim

1. (1921) 1 K.B. 423 at 447.

Ganesa Aiyar *v.* Lakshmi Co-operative Building Society.

any portion of the profits for the year 1929-30. The plaintiff is thus entitled only to a decree for Rs. 120-3-0. I therefore reverse the decree of the lower Court and pass a decree in favour of the plaintiff for the sum of Rs. 120-3-0 with interest at 6 per cent. per annum from the date of plaint with costs on the amount decreed both here and in the Court below.

K. C. —— *Petition allowed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Madras.]

PRESENT:—LORD ROCHE, SIR SHADI LAL AND SIR GEORGE RANKIN.

R. T. Rangachari .. *Appellant**

v.

The Secretary of State for India in Council .. *Respondent.*

P.C. Rangachari *v.* Secretary of State for India in Council.

Government servant—Wrongful dismissal—Departmental enquiry—Prior order permitting retirement on medical grounds—Pension paid for certain time—Subsequent order of dismissal and annulment of pension—Validity—Dismissal by person below the rank of appointing officer—Delegation of power —Validity—Suit for declaration of right to pension and for damages—Pensions Act (XXIII of 1871) and rules made thereunder—Effect—Government of India Act of 1919 as amended—Scope and effect.

The appellant was a Sub-Inspector of Police in the Madras Presidency. Certain charges of irregular and improper conduct in the execution of his duties as a police officer were made against him and were the subject of an official enquiry by the Assistant Superintendent of Police for the District in which the appellant was serving. The appellant who had at that time been in bad health applied to be invalidated. Subsequently, after consultations between the Assistant Superintendent of Police and the Acting District Superintendent of Police, it was decided that the appellant should be permitted to retire on grounds of health and that an invalid pension should be awarded to him. The appellant retired from service and was paid his pension for a period of three months. Subsequently, however, acting on a prior report of the Assistant Superintendent of Police a succeeding Superintendent of Police placed the matter before the Deputy Inspector-General of Police and this resulted in the dismissal of the appellant from service and in the annulment of his pension. The appellant then unsuccessfully memorialised to the Government and later filed a suit against the Secretary of State for India in Council for a declaration that he was not liable to be removed from service and for damages. Both the Courts in India having held against him the appellant preferred an appeal to the Privy Council.

Held, that the order purporting to remove the appellant from service at a time when he had for some months duly and properly ceased to be in service was a mere nullity and could not be sustained, and that he had every right to complain of the stoppage of the pension as a breach of the rules relating to pensions.

* P. C. Appeal No. 14 of 1936. 8th December, 1936.

P.C.

Rangachari v. Secretary of State for India in Council.

Held also, that the purported dismissal having emanated from an official lower in rank than the Inspector-General of Police, who appointed the appellant, was bad and inoperative and that the dismissal could not be supported on the ground of delegation of powers.

Held, however, that the suit for declaration and damages was not maintainable at the instance of the appellant in view of the provisions of S. 96-B of the Government of India Act and the rules made thereunder and that the appellant was therefore not entitled to any relief.

Decision of the Madras High Court (Beasley, C.J., and Bardswell, J.), reported in *Rangachari* v. *The Secretary of State for India in Council*, (1933) 67 M.L.J. 123 : I.L.R. 57 Mad. 857, affirmed.

The facts of the case are fully set out in the judgment of their Lordships and in the judgment of the High Court reported in *Rangachari* v. *The Secretary of State*[1].

J. M. Parikh and *Abdul Majid* for Appellant.—In this case there is no dismissal and I am not relying upon dismissal but the plea of the Crown was that the charges were pending and that the plaintiff was properly dismissed. Mr. Justice Waller holds that S. 32 (2) of the Government of India Act, 1919, is an answer to the plaintiff's suit.

Sir George Rankin.—Under the *Peninsular and Oriental Steam Navigation Company's case*[2] and the other decisions as to the meaning of S. 32, you could not sue the East India Company for anything that was an Act of State. Consequently Mr. Justice Waller says that in this case you cannot sue the Government, but I suppose that the question there depends entirely upon whether this is a suit for breach of contract? If it is a suit for breach of contract, and not for tort, it may be that that line of reasoning will not hold. That will be my argument.

Lord Roche.—There must have been a number of cases about the matter.

Sir George Rankin.—The cases are cases which said that before the Government of India Act that man was employed at pleasure, and for that reason no action lies, and for that reason, no doubt, no action could have laid against the East India Company too, but that does not affect the position under S. 32, or under S. 96. Mr. Justice Waller says that a suit of this kind could not have been brought against the East India Company and cannot now be brought against the Secretary of State.

That is wrong in law. If your Lordships come to the conclusion that this is a matter of contract then a suit could have been brought against the Secretary of State.

Lord Roche.—That is the whole question. If it is an office held at pleasure, there is no contract in the ordinary sense at all, or at least not an enforceable contract; it is not an actionable con-

1. (1933) 67 M.L.J. 123: I.L.R. 57 Mad. 857.
2. (1868) 5 Bom.H.C.R. 1.

P.C.

Rangachari v. Secretary of State for India in Council.

tract in respect of which a suit for wrongful dismissal would lie. There is not a single case in which it has been held that the East India Company could not be sued in respect of a contract. This is a contract and being a contract an action could have been brought against the East India Company as well as against the Secretary of State. *The Peninsular and Oriental Steam Navigation Company's case*[1] is a case of tort.

Lord Roche.—I was going to ask you whether you have come across a case in which a servant sued for being dismissed?

Sir George Rankin.—There are any amount of cases where people have brought suits against the old East India Company and even against the Government where it has been said: "You are a servant at pleasure and therefore no action lies", that is to say, you have got no merits; not that you are wrong in form, but that you have no merits.

If your Lordships come to the conclusion that in the present case the contract is at pleasure with no qualification, then that is the end of the matter.

Lord Roche.—In order that I may gather what the scope of your argument will be, are you going to rely upon breach of statutory rules as an independent cause of action?

My submission would be that this is a contract the terms of which are those as stated in the rules, and therefore, if there is a breach of it, it would be something done against the terms of the contract.

Lord Roche.—That is contract. That is not independent of the contract.

The declaration prayed for is that the plaintiff was wrongfully dismissed. It is set out in para. 19. The claim for damages was given up in the Court below.

Sir George Rankin.—If we come to the conclusion that there was a contract other than one involving a liability to dismissal at pleasure, and that an action will lie against the Secretary of State in respect a breach of that contract then even if you do not insist upon your claim for damages, if you are entitled to a declaration on the footing of being entitled to damages, you do not want the fact that you do not claim damages to be used against you on the question of the declaration. Is that the position?

Yes, my Lord. My contention is that r. 351, under sub-S. 4 of S. 96-B has been confirmed and validated by Parliament, and that has introduced into the contract of service a term which includes the grant of a pension. Therefore the servant could only be deprived of the pension under r. 351. My submission is

1. (1868) 5 Bom. H. C. R. 1.

P.C.

Rangachari *v.* Secretary of State for India in Council.

that, when the Act was passed, not before that, all the rules became part of the contract. (*Gould* v. *Stuart*[1].) My submission is that wherever there is a contract, and there is a breach of that contract, an action lies against the Secretary of State. *Peninsular and Oriental Steamship Navigation Company's case*[2] and *Secretary of State* v. *Shreegobinda Chaudhury*[3].

Lord Roche.—I should think that that is right, if you can find the word " contract " to mean a contract which is enforceable.

That is the next step. A breach of it by an officer of the Government in his executive capacity is not an Act of State or a Sovereign Act as the Court below has held. The substance of an Act of State is that it must be an act done by even the officers of the Government in relation to people who do not even owe temporary allegiance to the Crown. Lord Atkin has clearly defined an Act of State in *Eshugbayi Eleko* v. *Government of Nigeria*[4]. It was an error of the learned Judges below to say that this was an Act of State. Refers to the authorities collected in Sir Courtney Ilbert's Government of India, 2nd Edn. (1907), p. 154, Ch. 3 " Digest of Statutory Enactments relating to the Government of India, Part 1", S. 20 " Indian Appointments". Refers to cases cited in *Ram Das Hazra* v. *Secretary of State*[5] and to *Shenton* v. *Smith*[6], *Gould* v. *Stuart*[1], *Young* v. *Waller*[7] and *Young* v. *Adams*[8]. Under S. 96-B, sub-S. (2) there is no power to make any rule which will go so far as to oust any jurisdiction of the Court. I submit that the Secretary of State for India is not empowered, in making rules as regards the matters mentioned in sub-S. (2), to make, either directly or indirectly, a rule which might affect the jurisdiction of the Court. The effect of sub-S. (4) is that, as the old rules were confirmed, they became rules having legal effect, that is they became part of the statutory law, and should be given full effect. The effect as regards the pension is this; that the whole of the rules, having become part of the statute, the statute law for the time being becomes as if it were incorporated in the contract, and they are all terms of the contract. Sub-S. (4) of S. 96-B of the Government of India Act brings in r. 351 of Civil Service Classification Rules, and makes it part of the contract. R. 351, being made part of the contract by S. 96-B, makes the right to pension on those terms part of the contract so as to introduce the jurisdiction of the Court over the contract, under the provisions that have been made. As regards S. 96-B, sub-S. 1

1. (1896) A.C. 575.
2. (1868) 5 Bom. H. C. R. App. 1.
3. (1932) I.L.R. 59 Cal. 1289 at 1299.
4. (1931) A.C. 662 at 671.
5. (1912) 18 C.W.N. 106 at 110.
6. (1895) A.C. 229 at 234.
7. (1898) A.C. 661 at 664.
8. (1898) A.C. 469.

my submission is that, being a pensioner at the time and having retired, I am not on service, and, therefore, I do not come under S. 96-B and "service during pleasure" does not apply to my case.

Lord Roche.—You say that he was not on service and, therefore, it is immaterial whether his appointment was at pleasure or not when he was in service.

Yes. I submit that the whole scope of the section should be taken into consideration, and that all words, expressions, phrases and sentences must be given effect to as far as it is possible. The construction adopted by the Court below that the words "at pleasure" are not affected by anything in S. 96-B is erroneous. I submit that those words have such a limitation of qualification as may be put upon them by the provisions of the Act and the rules thereunder.

Lord Roche.—You say that it is a qualified holding at pleasure, that it is qualified by certain conditions restraining the exercise of the pleasure.

Yes. The Public Servants (Enquiries) Act, 1850, does not apply to all civil servants; it has a limited application; it applied only to gazetted officers appointed by the Government. It does not apply to officers appointed by authorities subordinate to the Government. After the words "within the scope of his duty", S. 96-B, sub-S. 1 says "but no person in that service may be dismissed by any authority subordinate to that by which he was appointed". The appellant was appointed by the Inspector-General of Police and dismissed by the Deputy Inspector-General of Police. My submission is as sub-S. (1) is introduced with the word "but", the interpretation is that, subject to the provisions of the Government of India Act and of the rules, he holds office during pleasure, but the dismissal must be by the authority which has appointed him.

Lord Roche.—There seems to be a good deal in the contention that if there is an express provision that the person in service may be dismissed only by authority as high as the one which appointed him, and not by any lower authority, a general power in the superior to delegate to the subordinate cannot apply to wipe that out, or you would simply get it wiped out. There is no finding here, is there, that there was in this case an express delegation of the power to a subordinate?

No, not express.

Sir George Rankin.—Here the Secretary of State has given the power o local Governments, and the local Government has given the power to dismiss to Deputy Inspector-Generals. Those rules were produced to the Court. You say that the saving: "Subject to the provisions of this Act and of rules made thereunder"

P.C.
Rangachari
v.
Secretary of State for India in Council.

stops at the word "duty" and that thereafter you get something that is antithetic, and is not modified by the opening words of the sub-section.

Yes.

Sir George Rankin.—And you have this further in your favour, that in the second part of the sub-section the words are repeated: "except so far as he may provide by rules to the contrary", so that from the word "and" down to the end of that sub-section it is clear enough that it is not subject to the opening words of the section.

Yes, My Lord. I submit that this clause which is introduced by the word "but" must affect the previous part of the section.

Lord Roche.—You say that you were not dismissed by anybody, but you were invalided out? It may not be necessary to decide this. That is so, but this is on the alternative argument. S. 96-B, sub-S. 1 says: "Subject to the provisions of this Act and the rules made thereunder", and the legislature says "Never mind what the provisions may be, either of this section, or of any other parts of the Act, and also never mind what rules may be made under the Act, it is the intention of the legislature that no person in that service may be dismissed by any authority subordinate to that by which he was appointed."

That is my submission.

Sir George Rankin.—The two provisions that say that he is to hold office at pleasure, and that he may be employed in any manner required by a proper authority, is made better for him by the rules made under the Act, but the other provision in his favour, that he is not to be dismissed by any lower authority than that by which he is appointed, is not capable of being altered against him in any way.

In other words, I submit, first, that on the construction of S. 96-B (6) the existing rules, when they were declared to be duly made and confirmed, acquired legal effect: before the passing of the Act they had no legal effect; secondly, that the jurisdiction of the Court is not mentioned in the part of the Act dealing with S. 96-B; and if it had been the intention of the legislature to limit the jurisdiction of the Court, it would have said so, as it has done in other parts of the Act. Under S. 96-B (2) the Secretary of State is not given any power to make any rule which would limit or oust the jurisdiction of the Court. The rules made under sub-Ss. 4 and 2 stand on the same footing. The Pensions Act, 1871, does not apply, as it is inconsistent, because in the first place it deals with a pension which was not legally enforceable at the time it was passed, and if it is construed to include the pension in the present case,

P.C.

Rangachari v. Secretary of State for India in Council.

which I submit became legally enforceable there would be inconsistency. Both Courts have said that my dismissal was wrongful, but that they could not make a declaration, because under S. 6 of the Pensions Act, if they were to make a declaration it would affect the liability of the Government to pay the pension. The word "liability" in that section must mean a legal liability which can be enforced in a Court of Law. Granting me a declaration that my dismissal was wrongful would not throw upon the Government a legal liability which could be enforced by the plaintiff. I am making no claim to a pension in any shape or form, I only want a declaration. Refers to *Fischer* v. *Secretary of State for India in Council*[1], *Baroni* v. *Secretary of State for India*[2], *Secretary of State for India* v. *D'Attaides*[3], *Bimalacharan Batabyal* v. *Trustees for the Indian Museum*[4]. In England the Courts have held that the service is at the pleasure of the Crown and that no action would lie for dismissal because it is an implied condition of the contract that the servant can be dismissed at pleasure *Gould* v. *Stuart*[5] and *Shenton* v. *Smith*[6]. Refers to *Ram Rup* v. *Sarn Dayal*[7]. If the rules here have the same effect as in the case of *Shenton* v. *Smith*[6] then there is no protection in a Court of Law. In *Gould* v. *Stuart*[5] they said that it was the policy of the Act.

Lord Roche.—The real point is whether this is a *Gould case*[5] or a *Shenton case*[6].

Yes, my Lord.

Abdul Majid followed for Appellant.—The High Court erred in not granting a declaration that the plaintiff-appellant was wrongfully dismissed and his pension wrongfully stopped, and that he was in the alternative entitled to damages, all facts having been concurrently found in his favour. Refers to *Allen* v. *Flood*[8]. The fundamental rules framed under the Government of India Act, 1919, being made under the statute, become part of the statute. The Pensions Act, 1871, is not dealing with pensions in the case of Government servants, who have become entitled to pensions under ordinary Government rules, in respect of their services. That Act does not at all affect the pensions that are earned under rules made under S. 96-B of the Government of India Act.

Their Lordships then called upon Mr. Subba Row for R. Venkata Rao the appellant in the connected appeal.

---

1. (1898) L.R. 26 I.A. 16: I.L.R. 22 Mad. 270 (P.C.).
2. (1929) I.L.R. 8 Rang. 215.
3. (1934) I.L.R. 12 Rang. 556.
4. (1929) I.L.R. 57 Cal. 231.
5. (1896) A.C. 575.
6. (1895) A.C. 229 at 234.
7. A.I.R. 1936 Lah. 282.
8. (1898) A.C. 1 at 72.

P.C.
Rangachari
v.
Secretary of State for India in Council.

P. V. Subba Row and *Ralph Parikh* for Appellant.—There was no enquiry as contemplated by the rules. All the Judges have found that in this case there was no regular departmental enquiry, and that finding is not disputed now. The appellant complied with the rules and by a Memorial appealed to the Government of Madras, and it was said that having appealed the appellant had exhausted his remedies, but I submit there has really been no inquiry under the rules, and there was not an appeal under the rules as contemplated by the rules. I submit that as the appellant was dismissed without an enquiry according to the rules, that was a wrongful dismissal. It is not necessary for the purpose of my case to go into the question of the effect of the rules framed under sub-S. 4. I rely upon the rules made under sub-S. 2, and submit that they should be given the same meaning as the words in the section itself which limit the exercise of the pleasure of the Crown. The rules should have the same effect as if they had been incorporated in the Act itself. All the cases have been referred to by my learned friend Mr. Parikh.

A. M. Dunne, K.C. and *W. Wallach* for Respondent.—As to the appellant Rangachari, I submit he does not disclose any cause of action in respect of which the respondent is liable to suit. His suit is not of the kind permitted by S. 32 (2) of the Government of India Act. In the circumstances of this case the Court in India has no jurisdiction under S. 6 of the Pensions Act to make an order by which the liability of the Government to pay a pension to the plaintiff is affected directly or indirectly. The only remedy which the plaintiff had was by an appeal under r. 16 of the Civil Services Classification Rules for application to Governors' Provinces. As to the appellant, Venkata Rao, he held his office during His Majesty's pleasure and no suit for damages can arise on His Majesty exercising his authority in dismissing the plaintiff. Nor is the plaintiff's suit of the kind permitted by S. 32 (2) of the Government of India Act. R. 14 of the Civil Services Classification Rules for application to Governors' Provinces, relied upon by the plaintiff specifically provides that it is without prejudice to the provisions of the Public Servants (Enquiries) Act, 1850, and S. 25 of that Act bars the plaintiff's suit. The only remedy which the plaintiff had was by way of an appeal under r. 16 of the Civil Services Classification Rules for application to Governors' Provinces. The decisions of the Courts of India are correct except in so far as they stated that there had been no proper enquiry under r. 14 of the Civil Services Classification Rules, there having been such an enquiry in fact.

P.C.

Rangachari *v.* Secretary of State for India in Council.

Lord Roche.

8th December, 1936. Their Lordships' judgment was delivered by

LORD ROCHE.—This is the appeal of the plaintiff in the action against a decree of the High Court of Madras, in its appellate jurisdiction, dismissing an appeal against a decree of the High Court in its original jurisdiction whereby the action of the plaintiff had been dismissed and judgment had been entered for the defendant.

The facts giving rise to the litigation are as follows: Prior to and in the month of July, 1927, the appellant was a Sub-Inspector of Police in the Presidency of Madras. Certain charges of irregular and improper conduct in the execution of his duties as a police officer were made against him and were the subject of an official enquiry conducted by a Mr. Charsley, an Assistant Superintendent of Police for the district in which the appellant was serving. This enquiry was held in the manner required by r. 14 of the statutory rules 1924, Nos. 354 and 355 (the Civil Services Classification Rules), made under S. 96-B (2) of the Government of India Act, 1919. Mr. Charsley had concluded his enquiry on 7th September. At that date the Acting District Superintendent of Police was a Mr. Kalimullah who had taken charge of the district in August and continued in charge until the latter part of October, when he was succeeded by a Mr. Loveluck. The appellant had for some time prior to 7th September been in bad health and on that date when Mr. Charsley finished the enquiry the appellant had applied to him in the following terms: "I beg to submit that I am growing worse with my hernia and I am unfit for further service. I pray that I may kindly be placed before the District Medical Officer for being invalided." This request was transmitted to Mr. Kalimullah by Mr. Charsley with a statement that "He (the appellant) may be sent before the District Medical Officer with a requisition. It appears to be true that he has a bad rupture. I have completed the enquiry against him." On 9th September there was an important conference between Mr. Charsley and Mr. Kalimullah as to the course to be adopted with regard to the appellant. The result seems to their Lordships to be now quite clear and their Lordships agree with the findings of both Courts below which are in substantial agreement in all material respects. Two courses were under consideration: disciplinary action such as dismissal on the one hand and on

P.C.

Rangachari v. Secretary of State for India in Council.

Lord Roche.

the other retirement for health reasons on pension. Mr. Charsley's view was adverse to the appellant and he thought that the charges were established and so informed Mr. Kalimullah, but he recognised, as was the fact, that the decision rested with Mr. Kalimullah and not with him. Mr. Kalimullah after giving the matter careful consideration and after full discussion with Mr. Charsley arrived, in all good faith, as both Courts have found, at the decision that the evidence was doubtful and inconclusive and that the charges should be dropped and that accordingly the appellant, subject to a medical certificate, which on the known facts it was anticipated would be granted, should be allowed to retire on grounds of health and that an invalid pension should be awarded to him. There is no dispute that Mr. Kalimullah was fully competent so to drop the charges and to come to the determination to which both Courts have found that he did come with perfect honesty. Mr. Charsley quite properly bowed to the decision though safeguarding himself with a statement that he would send in his report. He did so on 2nd October and like the view he orally expressed on 9th September it was adverse to the appellant. Meanwhile on 16th September a medical certificate was granted and on 13th October the pension roll was signed by Mr. Moore, the Deputy Inspector-General of Police, sanctioning the granting of an invalid pension of Rs. 41 a month, and on 4th November the appropriate authorisation for payment of the pension to date from 17th September was issued from the office of the Accountant-General. Mr. Moore had been told by Mr. Charsley on 9th September about the charges against the appellant and of Mr. Kalimullah's view that he should nevertheless be invalided out of the service. The appellant in fact retired from the service and his pension was paid to him for the months of September, October and November. The trouble which arose with regard to it subsequently was due to the following circumstances. Mr. Charsley's report had been put aside in the office and not brought before Mr. Kalimullah by his subordinates. Had it been so brought before him there is no probability that he would have altered the decision or the course of action upon which he had determined upon the same material on 9th September, but he might, and apparently ought to, have made a record of his decision in respect of the report and this he did not do. Accordingly, when he went out of office and Mr. Loveluck

succeeded him and saw the report, there was not unnaturally both suspicion and trouble. The adverse view of Mr. Charsley in writing was given more weight than the unrecorded reasons of Mr. Kalimullah for forming a more lenient and more cautious judgment as to the extent to which the charges made could be or were supported by reliable evidence. The view taken was that the report ought to have been put before the pensions authorities or before the Deputy Inspector-General who was asked to authorise the pension. Their Lordships are not in a position to say whether this view is correct as a matter of departmental practice, but it is clear that if there was a neglect of proper procedure it was not due to any want of good faith. As has been already stated the then Deputy Inspector-General Mr. Moore, was told, according to Mr. Charsley, of his enquiry and of his view of the matter and of his proposed report. This however was not so plain at the time as it has now become and indeed was probably unknown to Mr. Loveluck who succeeded Mr. Kalimullah and to Mr. Filson who by this time had succeeded Mr. Moore. The upshot was that the pension was first suspended for further consideration and that on 28th February, 1928, Mr. Filson issued an order purporting to remove the appellant from the service from the date upon which he was invalided. The grant of pension was also annulled or put an end to. The appellant memorialized the Government of Madras against this decision basing his prayer for relief from the cancellation of the order stopping his pension upon the simple ground that the matter had been decided by a competent authority and could not be re-opened. There was a discussion at the time whether the appellant's proper procedure under the rules should not have been by appeal rather than by memorial, but on the argument before their Lordships no point was made of this and it was agreed that the substantial matter was brought before Government by the appellant's memorial and that relief was refused and that a further memorial to the Government of India was withheld by the Madras Government pursuant to a discretion vested in it by the material rules. The present action was then brought.

The first question is, has the appellant suffered a wrong, that is to say, is his complaint well founded in fact. If it is then a second question arises, namely, is the wrong actionable and ought the appellant to have succeeded in this action.

P.C.
Rangachari
v.
Secretary of
State for
India in
Council.
Lord Roche.

The answer to the first question seems to their Lordships plainly to be in the affirmative. It is not contended that r. 351 of the pensions rules relating to conduct had any bearing on the matter or justified withdrawal of the pension. But their Lordships appreciate that for reasons which have already been indicated, irregularity or slackness of procedure may have given rise to suspicions of good faith which the investigation of the subject in this action has, or ought to have, entirely removed. In these circumstances the case becomes a case in which after government officials duly competent and duly authorised in that behalf have arrived honestly at one decision their successors in office, after the decision has been acted upon and is in effective operation, purport to enter upon a reconsideration of the matter and to arrive at another and totally different decision. It seems to require no demonstration that an order purporting to remove the appellant from the service at a time when, as their Lordships hold, he had for some months duly and properly ceased to be in the service, was a mere nullity and cannot be sustained. It follows that in their Lordships' view the appellant had, and has, every right to complain of the stoppage of the pension as a breach of the rules relating to pensions. Both Courts below so held and their Lordships are in entire agreement with their decision on this point.

The second point as to the right of action therefore arises. Both Courts below have decided that the Courts cannot give the relief prayed and that the action fails. The main ground of their decision is that the action is one which by virtue of the provisions of the Pensions Act of 1871 a Civil Court is prohibited from entertaining. It is necessary to see precisely what the relief claimed was and to see what the relevant statutory provisions are. By the plaint the appellant prayed a decree for a declaration that the plaintiff was not liable to be removed from the service subsequent to his retirement and also claimed damages and other relief. At the trial all claims except that for a declaration were dropped. The trial judge thought he could not and ought not to make such a declaration and the judges on appeal were of the same opinion. In both Courts the conclusion was reached that in substance the claim was for a declaration that the appellant was entitled to his pension and so in their Lordships' judgment it was. S. 4 of the Pensions

P.C.
Rangachari v. Secretary of State for India in Council.
Lord Roche.

Act (No. XXIII of 1871) reads as follows: "Except as hereinafter provided, no Civil Court shall entertain any suit relating to any pension or grant of money or land revenue conferred or made by the British or any former Government, whatever may have been the consideration for any such pension or grant, and, whatever may have been the nature of the payment, claim or right for which such pension or grant, may have been substituted". S. 6 which empowers a Civil Court in certain circumstances to take cognizance of certain matters as to pensions provides as follows: "but (the Court) shall not make any order or decree in any suit whatever by which the liability of Government to pay any such pension or grant as aforesaid is affected directly or indirectly." The Courts below held that having regard to the essential nature of this action it was within the prohibitions above set out. It was hardly disputed before their Lordships that this would be the correct view, but for the enactment of the Act of 1919. The main force of the argument for the appellant was directed to the support of a proposition which may be shortly stated as follows: By the terms of S. 96-B of the Act of 1919 the pensions rules are made statutory and of the same force as if they were set out in the statute itself: also by the terms of the section, persons in the civil service of the Crown in India hold office not simply at pleasure but on the terms set out both in the section and in all the rules made thereunder including the pensions rules: further it was said that since a statutory right is thus created between the Crown and the servant it is necessarily to be implied that any provisions in any antecedent statute repugnant to the terms of the statute creating such right are repealed or rendered inapplicable to such a case. With regard to the first part of this argument, namely, as to the effect of the statute of 1919 and in particular as to whether it confers a right of action to enforce the rules made thereunder, their Lordships, in giving their advice to His Majesty in the appeal No. 15 of 1936 (*Venkata Rao* v. *Secretary of State*[1]) which was argued at the same time as this appeal will have to enter more at length into their reasons for rejecting such an argument. It is sufficient to say here that in their Lordships' opinion it is untenable. The next step seems even more difficult for the appellant and their Lordships are quite unable to hold

1. (1937) 1 M.L.J. 529: L.R. 64 I.A. 55.

P.C.

Rangachari v. Secretary of State for India in Council.

Lord Roche.

that by reason of any repugnancy and implied repeal the provisions of the Pensions Act are rendered inapplicable to the present action.

There is however another point raised and in the Courts below decided adversely to the plaintiff which has given their Lordships considerable anxiety. S. 96-B contains the following proviso: "But no person in that service (the civil service of the Crown) may be dismissed by any authority subordinate to that by which he was appointed." The purported dismissal of the appellant on 28th February, 1928, emanated from an official lower in rank than the Inspector-General who appointed the appellant to his office. The Courts below held that the power of dismissal was in fact delegated and was lawfully delegated to the person who purported to exercise it. Counsel for the respondent candidly expressed a doubt as to the possibility of maintaining this view and indeed it is manifest that if power to delegate this power could be taken under rules it would wipe out a proviso and destroy a protection contained not in rules but in the section itself. Their Lordships are clearly of opinion that the dismissal purporting to be thus ordered in February was by reason of its origin bad and inoperative. Their Lordships have most anxiously considered whether some relief by way of declaration to this effect should not be granted. It is manifest that the stipulation or proviso as to dismissal is itself of statutory force and stands on a footing quite other than any matters of rule which are of infinite variety and can be changed from time to time. It is plainly necessary that this statutory safeguard should be observed with the utmost care and that a deprivation of pension based upon a dismissal purporting to be made by an official who is prohibited by statute from making it rests upon an illegal and improper foundation. But although their Lordships differ in this important matter from the reasoning and conclusions of the Courts below they are not on the whole prepared to direct that a declaration on this point should be made. The questions of fact and law are now decided and a declaration could have no greater effect than the decision itself. After this lapse of time and having regard to his health no one suggests that the appellant can now be restored to his office and the matter of pension and the responsibility of doing right in that regard rests with the government. Accordingly their Lordships agree in the view

P.C.
Rangachari v. Secretary of State for India in Council.
Lord Roche.

of the Courts below that no order or declaration should be made in this action. It was urged that unless the rights of the appellant could be enforced by action the provisions of S. 96-B and of the rules to which force was thereby given would be nugatory and useless. Their Lordships cannot take that view. They cannot doubt that the charter and the pledge contained in the statute and in the consequential rules are generally observed and fulfilled and though in this instance for reasons, which are comprehensible but as now appears are insufficient, this has so far unfortunately not proved to be the case there is yet both time and opportunity for the appropriate action to be taken by the executive now that the important questions of principle are disposed of.

Their Lordships are dealing with various other and minor points which arose in this case, such as the effect of S. 32 of the Act of 1919, in their judgment in the appeal No. 15 of 1936 (*Venkata Rao* v. *Secretary of State*) and it is unnecessary to repeat the observations there made.

Their Lordships will humbly advise His Majesty that the appeal ought to be dismissed.

The appeal was *in forma pauperis* and there will be no order as to costs.

Solicitors for Appellant: *G. K. Kannepalli.*

Solicitors for Respondent: *The Solicitor, India Office.*

S.P.K.
B.V.V. —— *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Madras.]

PRESENT:—LORD ROCHE, SIR SHADI LAL AND SIR GEORGE RANKIN.

R. Venkata Rao .. *Appellant**

v.

The Secretary of State for India in Council .. *Respondent.*

P.C.
Venkata Rao v. Secretary of State for India in Council.

Government servant—Office held at pleasure—Dismissal—Failure to conduct proper enquiry—Right of dismissed servant to sue for damages—Government of India Act of 1919 as amended—Scope and effect—Civil Service Classification Rules, r. 14—Failure to comply with—Order of dismissal if invalidated—Proper procedure for dismissal from service—Need for observance by Government.

*P.C. Appeal No. 15 of 1936. 8th December, 1936.

P.C.
Venkata Rao v. Secretary of State for India in Council.

The appellant, who was employed as a reader in the Government Press, Madras, was charged for misconduct and was eventually dismissed from service. After unsuccessfully memorialising to the Government he filed a suit against the Secretary of State for India in Council for recovery of damages for wrongful dismissal from service. He complained that the dismissal was contrary to statute inasmuch as it was not preceded by any such enquiry as is contemplated by r. 14 of the Civil Services Classification Rules made thereunder. It was proved that though there was some sort of enquiry the requirements of r. 14 were not satisfied, but the suit was dismissed on the ground that the appellant had no right of suit.

Held, that the office of the appellant being one held at pleasure was liable to be terminated at the discretion of the Government and that the appellant was not entitled to any relief. The argument for a limited and a special kind of employment during pleasure but with an added contractual term that the rules are to be observed is at once too artificial and too far-reaching to commend itself for acceptance.

S. 96-B contains a statutory and solemn assurance that the tenure of office though at pleasure will not be subject to capricious or arbitrary action but will be regulated by rule. The provisions for appeal in the rules are made pursuant to the principles so laid down. It is obvious therefore that supreme care should be taken that this assurance should be carried out in the letter and in the spirit and the very fact that the Government in the end is the supreme determining body makes it the more important both that the rules should be strictly adhered to and that the rights of appeal should be real rights involving consideration by another authority prepared to admit error, if error there be, and to make proper redress if wrong has been done.

[The arguments are set out in *Rangachari* v. *Secretary of State*, *supra* at p. 515.]

P. V. Subba Rao and *Ralph Parikh* for Appellant.

A. M. Dunne, K.C. and *W. Wallach* for Respondent.

Lord Roche.

8th December, 1936. Their Lordships' judgment was delivered by

LORD ROCHE.—This is an appeal against a decree dated 19th December, 1933, of the High Court of Judicature at Madras in its appellate jurisdiction affirming a judgment of the High Court in its original jurisdiction dismissing the action of the present appellant, the plaintiff in the action. The action was one claiming damages for wrongful dismissal from government service and the questions involved were whether the dismissal was in fact wrongful and in breach of the material rules of the service and, if so, whether the suit for damages was maintainable.

The facts of the case were these: The appellant in May, 1924, was a reader in the Government Press, Madras, and as

P.C.

Venkata Rao *v.* Secretary of State for India in Council.

Lord Roche.

such reader held office in the civil service of the Crown in India. In May, 1924, he fell under suspicion of being concerned in a leakage of information in respect of pleadership examination papers. The appellant consistently and stoutly denied the charge. The matter was investigated and at first the appellant was directed to vindicate his character in a Court of law. He proceeded to do so by action for libel against a candidate for examination who was said to have informed against him. In this action he ultimately got judgment by default for nominal damages. Bnt before the case was determined the appellant was on 23rd August, 1924, suspended, and on 22nd September dismissed from the service. An appeal to the Madras Government by memorial was rejected. The present suit was brought on 17th December, 1927. In the plaint, as in the memorial to government, the appellant in addition to his arguments as to innocence in fact complained that the dismissal was contrary to the statute inasmuch as it was not preceded by any such enquiry as is prescribed by r. 14 of the Civil Service Classification Rules made thereunder. The material section of the statute (Government of India Act, 1919), is S. 96-B, which reads as follows:—

"(1) Subject to the provisions of this Act and of rules made thereunder, every person in the civil service of the Crown in India holds office during His Majesty's pleasure, and may be employed in any manner required by a proper authority within the scope of his duty, but no person in that service may be dismissed by any authority subordinate to that by which he was appointed, and the Secretary of State in Council may (except so far as he may provide by rules to the contrary) reinstate any person in that service who has been dismissed.

"If any such person appointed by the Secretary of State in Council thinks himself wronged by an order of an official superior in a governor's province, and on due application made to that superior does not receive the redress to which he may consider himself entitled, he may, without prejudice to any other right of redress, complain to the governor of the province in order to obtain justice, and the governor is hereby directed to examine such complaint and require such action to be taken thereon as may appear to him to be just and equitable.

"(2) The Secretary of State in Council may make rules for regulating the classification of the civil services in India, the methods of their recruitment, their conditions of service, pay and allowances, and discipline and conduct. Such rules may, to such extent and in respect of such matters as may be prescribed, delegate the power of making rules to the Governor-General in Council or to local governments, or authorise the Indian legislature or local legislatures to make laws regulating the public services:

"Provided that every person appointed before the commencement of the Government of India Act, 1919, by the Secretary of State in Council to the

P.C.
Venkata Rao v. Secretary of State for India in Council.
Lord Roche.

civil service of the Crown in India shall retain all his existing or accruing rights, or shall receive such compensation for the loss of any of them as the Secretary of State in Council may consider just and equitable.

" (3) The right to pensions and the scale and conditions of pensions of all persons in the civil service of the Crown in India appointed by the Secretary of State in Council shall be regulated in accordance with the rules in force at the time of the passing of the Government of India Act, 1919. Any such rules may be varied or added to by the Secretary of State in Council and shall have effect as so varied or added to, but any such variation or addition shall not adversely affect the pension of any member of the service appointed before the date thereof.

" Nothing in this section or in any rule thereunder shall prejudice the rights to which any person may, or may have, become entitled under the provisions in relation to pensions contained in the East India Annuity Funds Act, 1874.

" (4) For the removal of doubts, it is hereby declared that all rules or other provisions in operation at the time of the passing of the Government of India Act, 1919, whether made by the Secretary of State in Council or by any other authority, relating to the civil service of the Crown in India, were duly made in accordance with the powers in that behalf, and are confirmed, but any such rules or provisions may be revoked, varied, or added to by rules or laws made under this section.

" (5) No rules or other provisions made or confirmed under this section shall be construed to limit or abridge the power of the Secretary of State in Council to deal with the case of any person in the civil service of the Crown in India in such manner as may appear to him to be just and equitable, and any rules made by the Secretary of State in Council under sub-S. (2) of this section delegating the power of making rules may provide for dispensing with or relaxing the requirements of such rules to such extent and in such manner as may be prescribed:

"Provided that where any such rule or provision is applicable to the case of any person, the case shall not be dealt with in any manner less favourable to him than that provided by the rule or provision."

Amongst the rules made or confirmed under the above section are certain Classification Rules of which the following are the most material:—

"XIII. Without prejudice to the provisions of any law for the time being in force, the Local Government may for good and sufficient reasons—

"(1) censure.
"(2) withhold promotion from,
"(3) reduce to a lower post,
"(4) suspend,
"(5) remove, or
"(6) dismiss

any officer holding a post in a provincial or subordinate service or a special appointment.

"XIV. Without prejudice to the provisions of the Public Servants Inquiries Act, 1850, in all cases in which the dismissal, removal or reduction of any officer is ordered, the order shall, except when it is based on facts or conclusions established at a judicial trial, or when the officer concerned has absconded with the accusation hanging over him, be preceded by a properly

recorded departmental enquiry. At such an enquiry a definite charge in writing shall be framed in respect of each offence and explained to the accused, the evidence in support of it and any evidence which he may adduce in his defence shall be recorded in his presence and his defence shall be taken down in writing. Each of the charges framed shall be discussed and a finding shall be recorded on each charge.

"XV. A Local Government may delegate to any subordinate authority, subject to such conditions, if any, as it may prescribe, any of the powers conferred by rule XIII in regard to officers of the subordinate services.

"XVI. Every officer against whom an order may be passed under rules X, XIII and XV, and who thinks himself wronged thereby shall be entitled to prefer at least one appeal against such order.

"XXVIII. The Secretary of State may call for any appeal withheld by the Local Government or the Government of India which under the rules may be made to him and may pass such orders as he considers fit; the Governor-General in Council may send for an appeal withheld by the Local Government which under the rules may be made to him, and may pass such orders as he considers fit."

The respondent's written statement alleged that r. 14 was substantially complied with and also raised questions of law as to the right of dismissal at pleasure and as to the suit not being maintainable. The matter first came before Beasley, J., who treated it as coming before him on a preliminary issue which assumed that no enquiry in accordance with r. 14 had in fact been held. Thinking quite rightly that the questions of law were of the greatest importance the learned Judge referred the matter to the Full Bench. When the case came on before the Full Bench the defendant's counsel said that he was prepared to prove that an enquiry had been held which complied substantially with the provisions of r. 14 and asked for an opportunity of establishing that defence. This was granted and the case was sent back and was heard by Waller, J. He took the evidence and after so doing found as follows:—

"There was, it is true, some sort of enquiry, but it was most certainly not of the sort prescribed by the rule. I say nothing about the omission to frame a charge; it being clear that the plaintiff knew perfectly well what the charge against him was; but in every other respect the enquiry was defective. Witnesses were examined but not in the presence of the plaintiff and he seems to have been dismissed mainly on the strength of a written statement made by one Sitaramayya not in his presence. I find that the requirements of r. 14 were not satisfied".

The learned Judge decided the questions of law against the appellant and dismissed the suit, but decided that in the circumstances the costs should be borne by the defendant. The appeal against this decision was heard at the same time as the appeal in *Rangachari's case* (No. 1 of 1931) in which their Lordships have just pronounced judgment. The Court consis-

P.C.

Venkata Rao v. Secretary of State for India in Council.

Lord Roche.

ting of the Chief Justice and Bardswell, J., agreed with the Court below on the question of fact saying that the procedure prescribed by the rule was not followed at all. But as they also agreed with the Court below on the questions of law they dismissed the appeal.

On the issue of fact which was expressly raised by the defendant their Lordships think that the findings of the Courts below were abundantly justified and were indeed inevitable. A most definite and salutary rule was disregarded in most essential respects and the contention which was in effect that what was done was "well enough" is a contention mischievous in tendency and ill-founded in fact. An excuse was made that the procedure prescribed was not followed because there was no power to compel the attendance of witnesses not in government service. This excuse was not accompanied by any allegation or proof that an attempt to secure the attendance of such witnesses was made and that the attempt had failed.

Their Lordships now pass to consider the questions of law raised in the appeal. The contention for the appellant was and is that the statute gives him a right enforceable by action to hold his office in accordance with the rules and that he could only be dismissed as provided by the rules and in accordance with the procedure prescribed thereby. The respondent's contention, and the decision of the Courts below, is that there is no such actionable right conferred by the statute.

There are two decisions of this Board much discussed in the Courts below which state the principles to be applied to cases such as this. The first is *Shenton* v. *Smith*[1] relied upon by the respondent and the other is *Gould* v. *Stuart*[2] relied upon for the appellant. In the first case Dr. Smith held office in the government medical service in Western Australia and relied upon certain rules and regulations of the service as an essential part of his contract of service. He was dismissed and brought an action for damages which failed. Upon appeal to Her Majesty in Council, Lord Hobhouse, in giving their Lordships' judgment, said:—

"It appears to their Lordships that the proper grounds of decision in this case have been expressed by Stone, J., in the Full Court. They consider that, unless in special cases where it is otherwise provided, servants of the Crown hold their offices during the pleasure of the Crown; not by virtue of any

1. (1895) A.C. 229.

2. (1896) A.C. 575.

special prerogative of the Crown, but because such are the terms of their engagement, as is well understood throughout the public service. If any public servant considers that he has been dismissed unjustly, his remedy is not by a law-suit, but by an appeal of an official or political kind . . . . As for the regulations, their Lordships again agree with Stone, J., that they are merely directions given by the Crown to the Governments of Crown Colonies for general guidance, and that they do not constitute a contract between the Crown and its servants".

A special case such as was contemplated in the above cited passage occurred in *Gould's case* where the Board, consisting of three members two of whom had sat in *Shenton's case*, held that the respondent Stuart held office in New South Wales under certain conditions expressly enacted in the body of the New South Wales Civil Service Act, 1884, and that these express provisions of the statute were "inconsistent with importing into the contract of service the term that the Crown may put an end to it at its pleasure."

The question is: Does the present case fall into the general category defined and illustrated by *Shenton's case* or the more exceptional category defined and illustrated by *Gould's case*? On the facts it stands somewhere between the two cases inasmuch as here the rules are expressly and closely related to the employment by the statute itself. In these circumstances difference of judicial view in India has manifested itself. There are decisions favourable to the present appellant in *Satish Chandra Das* v. *Secretary of State for India*[1] in *Baroni* v. *Secretary of State for India in Council*[2] and to some extent also in *Bimalacharan* v. *Trustees for the Indian Museum*[3]. On the other hand both Courts in the present case have adopted the contrary view. In their Lordships' opinion the judgments in the Courts below express the correct view. The reasons which have led their Lordships to this conclusion may be shortly stated. S. 96-B in express terms states that office is held during pleasure. There is therefore no need for the implication of this term and no room for its exclusion. The argument for a limited and special kind of employment during pleasure but with an added contractual term that the rules are to be observed is at once too artificial and too far-reaching to commend itself for acceptance. The rules are manifold in number and most minute in particularity and are all capable of change. Counsel for the appellant nevertheless contended with most logical consistency that

1. (1926) I.L.R. 54 Cal. 44. 2. (1929) I.L.R. 8 Rang. 215. 3. (1929) I.L.R. 57 Cal. 231.

P.C.

Venkata Rao v. Secretary of State for India in Council.

Lord Roche.

on the appellant's contention an action would lie for any breach of any of these rules, as for example of the rules as to leave and pensions and very many other matters. Inconvenience is not a final consideration in a matter of construction but it is at least worthy of consideration and it can hardly be doubted that the suggested procedure of control by the courts over government in the most detailed work of managing its services would cause not merely inconvenience but confusion. There is another consideration which seems to their Lordships to be of the utmost weight. S. 96-B and the rules make careful provision for redress of grievances by administrative process and it is to be observed that sub-S. 5 in conclusion reaffirms the supreme authority of the Secretary of State in Council over the civil service. These considerations have irresistibly led their Lordships to the conclusion that no such right of action as is contended for by the appellant exists. It is said that this is to treat the words "subject to the rules" appearing in the section as superfluous and ineffective. Their Lordships cannot accept this view and have already referred to this matter in their judgment in *Rangachari's case.* They regard the terms of the section as containing a statutory and solemn assurance that the tenure of office though at pleasure will not be subject to capricious or arbitrary action but will be regulated by rule. The provisions for appeal in the rules are made pursuant to the principle so laid down. It is obvious therefore that supreme care should be taken that this assurance should be carried out in the letter and in the spirit and the very fact that government in the end is the supreme determining body makes it the more important both that the rules should be strictly adhered to and that the rights of appeal should be real rights involving consideration by another authority prepared to admit error, if error there be, and to make proper redress, if wrong has been done. Their Lordships cannot and do not doubt that these considerations are and will be ever borne in mind by the governments concerned, and the fact that there happen to have arisen for their Lordships' consideration two cases, where there has been a serious and complete failure to adhere to important and indeed fundamental rules, does not alter this opinion. In these individual cases mistakes of a serious kind have been made and wrongs have been done which call for redress. But while thus holding on the clear facts of this case, as they now appear from the evidence, as they similarly held in *Rangachari's*

P.C.

Venkata Rao *v.* Secretary of State for India in Council.

Lord Roche.

case, their Lordships are unable as a matter of law to hold that redress is obtainable from the courts by action. To give redress is the responsibility, and their Lordships can only trust will be the pleasure, of the executive government. Their Lordships in these circumstances and taking this view of the effect of S. 96-B of the statute do not deem it necessary to discuss at length certain other grounds assigned for their conclusions by the Judges in the courts below. Their Lordships, however, deem it right to say that as at present advised they do not think that the Public Servants Inquiry Act of 1850 has any bearing on this action or upon *Rangachari's* action. These appellants do not seem to be servants falling within the scope of that Act, nor does a stipulation that the absence of an enquiry under that Act is not a bar to the removal of a servant constitute any reason why the absence of an enquiry under these rules should not be a bar to removal. The reasoning of the Courts below as to S. 32 of the India Act, 1919, and its effect and bearing on these actions is another matter to which their Lordships must not be taken to give their assent. As at present advised their Lordships are not disposed to think that this section, which is a section relating to parties and procedure, has an effect to limit or bar the right of action of a person entitled to a right against the Government, which would otherwise be enforceable by action against it, merely because an identical right of action did not exist at the date when the East India Company was the body if any to be sued. If it had appeared that the plaintiff's service under the Act of 1919 was not terminable at pleasure their Lordships are not prepared to say that remedy by suit against the Secretary of State in Council for a breach of the contract of service would not have been available to the plaintiff. Breach of contract by the Crown can in England be raised by petition of right. The fact that for a different reason—namely that service under the East India Company was at pleasure—a precisely similar suit could not have been brought against the company does not in their Lordships' view conclude the matter either under cl. 2 of S. 32 of the Act or on the reasoning of Sir Barnes Peacock in *P. & O. Steam Navigation Co.* v. *Secretary of State*[1].

---

1. (1861) 5 B.H.C.R. (App.) 1.

P.C.

Venkata Rao *v.* Secretary of State for India in Council,

Lord Roche.

For these reasons their Lordships will humbly advise His Majesty that this appeal, which by special leave was brought *in forma pauperis*, should be dismissed. There will be no order as to costs.

Solicitors for Appellant: *G. K. Kannepalle.*

Solicitors for Respondent: *The Solicitor, India Office.*

S. P. K. ——— *Appeal dismissed.*

B. V. V.

PRIVY COUNCIL.

[On appeal from the Court of the Judicial Commissioner of Sind.]

PRESENT:—LORD ROCHE, SIR SHADI LAL AND SIR GEORGE RANKIN.

Pir Ahsanullah Shah .. *Appellant**

v.

Pir Ziauddin Shah .. *Respondent.*

P.C.

Pir Ahsanullah Shah *v.* Pir Ziauddin Shah.

Practice—Questions of fact—Finding of trial Judge—Right of appeal—Finding not to be lightly interfered with—Judgment found erroneous after full consideration of case—Duty of appellate Court to interfere.

As the trial Judge has the advantage of seeing the witnesses and watching their demeanour, his finding, so far as it depends on the credibility of oral evidence, cannot be lightly interfered with in appeal; the law, however, gives a right of appeal from a judgment of the trial Court on questions of fact as well as on questions of law, and the Court of Appeal, after carefully weighing and considering the judgment, has to make up its own mind, and cannot shrink from overruling it, if, on a full consideration of all the material, it is satisfied that that judgment is clearly wrong.

Decision of the Court of the Judicial Commissioner of Sind reversing the judgment of the trial Court on the question of succession to the office of mutawalli and sajjadanashin affirmed.

These are consolidated appeals from two decrees of the Court of the Judicial Commissioner of Sind, dated 8th May, 1931, which reversed two decrees of the Subordinate Judge of Hyderabad dated 29th September, 1927, and decreed the plaintiff's claims in both suits.

The suits out of which these appeals arose relate to the wakf properties of the Jhandawala Pir's Dargah and to a library which was the private property of the father of the parties. The history of the endowment and the facts giving rise to the suit appear from the judgment of their Lordships. The only point of law involved in the suit was not dealt with by the Board as they deemed it unnecessary to make any pronouncement on the subject.

---

* P. C. Appeals Nos. 62 and 63 of 1934. 26th January, 1937.

P.C.
Pir Ahsanullah Shah *v.* Pir Ziauddin Shah.
Sir Shadi Lal.

J. M. Parikh for Appellant.

Leslie De Gruyther, K.C. and *W. Wallach* for Respondent.

26th January, 1937. Their Lordships' judgment was delivered by

SIR SHADI LAL.—The dispute in these two appeals relates to a Moslem shrine situated in the province of Sind, commonly known as the Durgah of Jhandawala Pir. It is common ground that Pir Rashidulla Shah was the last sajjadanashin (the person who sits on the sajjada or the carpet on which prayers are offered), or spiritual preceptor, of the Durgah, and also the mutwalli of the wakf property attached to it. He died in May, 1922, leaving five sons. The eldest of them, Ziauddin Shah, thereupon, claimed to be the successor of his father as sajjadanashin and mutwalli, and asked for the possession of the wakf property. His claim was resisted by the third son, Ahsanullah Shah, who advanced various grounds to defeat the plaintiff, and to support his own right to succeed the deceased Pir in both the offices. The Subordinate Judge dismissed the suit, but on appeal his view was overruled by the Court of the Judicial Commissioner, Sind, who decided the case in favour of the plaintiff.

The defendant has appealed to His Majesty in Council, and the main question for determination is whether the plaintiff has established his right to succeed to the offices of sajjadanashin and mutwalli.

It may be stated at the outset that it is no longer suggested by either of the parties that the succession is regulated by right of inheritance or by election by the members of the congregation. Nor is there any deed of dedication, or any evidence of usage prevailing in the institution, which governs the succession, except that both the offices are held by one and the same person. The parties are agreed that the mutwalli for the time being can nominate his successor, and that the person so nominated is entitled to succeed him.

It appears that in 1900 Pir Rashidulla Shah executed a document called hibanama (deed of gift), in which the defendant was marked out as his successor. But the Pir lived thereafter for many years, and it is undeniable that in 1916 he executed another document which is in the nature of a will. This document states in clear terms that he appoints the plaintiff to be his successor, and it is signed in token of his consent by the

P.C.

Pir Ahsanullah Shah v. Pir Ziauddin Shah.

Sir Shadi Lal.

defendant himself. It is clear that it abrogated the deed of 1900. The defendant, however, urges that the rule allowing the incumbent of the office to nominate his successor, which derives its authority from the Mohammedan law, prescribes that the nomination can be valid only if it was made while the incumbent was on his deathbed, or was suffering from a mortal illness, but not when he was in good health. This contention, which appears to be supported by some authorities on the Mohammedan law, would prevent a mutwalli from appointing his successor if he died suddenly without any expectation of death, and render ineffective any appointment made by him at a time when he was not on his deathbed or suffering from such illness.

It is, however, unnecessary to make any pronouncement on the subject, as their Lordships concur with the Court of Appeal in India that Rashidulla Shah, not only nominated the plaintiff as his successor by the instrument executed by him in 1916, but also described him as his successor in various letters written by him in 1921. He also confirmed the nomination to several respectable persons who had conversations with him during his last illness and within a short time prior to his death. Three of these persons were officials who occupied responsible positions under the Government, and they say that the late Pir told them in 1921 and 1922 that the plaintiff was to succeed him. The learned Judges of the Appellate Court rightly attached importance to their testimony, and no attempt has been made to impeach their credit. But the most important witness on the subject is a physician who treated the Pir for a month before his death. He states that the deceased showed him the document of 1916 and told him that he had appointed his son (the plaintiff) as his successor. This witness is related to both the parties, and appears to be a disinterested person.

It appears that the late Pir was a strong supporter of the Khilafat movement, and knowing, as he did, that the plaintiff shared his political views, it was only natural that he should favour the succession of a son who would help that movement after his death. Moreover, the plaintiff was, not only the eldest son, but also best fitted to perform the functions of the head of the institution.

The evidence, documentary as well as oral, fortified, as it is, by the circumstances of the case, leaves little doubt that Pir

P.C.

Pir Ahsanullah Shah v. Pir Ziauddin Shah.

Sir Shadi Lal.

Rashidulla Shah appointed the plaintiff to be his successor; and the appointment satisfies the condition mentioned above.

But it is claimed by the defendant that he *was* the last person nominated by his father to succeed him, but he has failed to establish his claim. There is no document subsequent to 1916 to support his claim, and the oral evidence produced by him is wholly unreliable, and has been rightly rejected by the Court of Appeal in India.

The Subordinate Judge, who tried the case, did not think that the late Pir made any declaration in favour of his eldest son during his illness; and, as the learned Judge had the advantage of seeing the witnesses and watching their demeanour, his finding, so far as it depends upon the credibility of oral evidence, cannot be lightly interfered with. His judgment is an unusually lengthy document and contains an elaborate discussion of matters which are not altogether relevant. That discussion has tended to obscure the real question in controversy between the parties, and to lessen the importance of the documentary evidence furnished by the deed executed by Rashidulla Shah in 1916, and the letters written by him in 1921, only a few months before his death. It is to be observed that the law gives a right of appeal from a judgment of a trial Court on questions of fact as well as on questions of law, and the Court of Appeal, after carefully weighing and considering the judgment, has to make up its own mind, and cannot shrink from overruling it, if, on a full consideration of all the material, it is satisfied that that judgment is clearly wrong. The learned Judges, who heard the appeal in the present case, have given convincing reasons for dissenting from the Trial Judge; and their Lordships, after examining the evidence, concur in the conclusion reached by them.

It must, therefore, be held that the plaintiff was validly appointed to the office of mutwalli, and also of sajjadanashin. The defendant's appeal arising out of the suit brought by the plaintiff to establish his title to both these offices consequently fails.

This disposes of the principal suit, and their Lordships must now deal with the suit instituted by the plaintiff to recover a library. The library was gifted to him by his father in 1909. The gift, which was said to have been made by word of mouth, was subsequently confirmed by the document of 1916,

P.C.
Pir Ahsanullah Shah v. Pir Ziauddin Shah.
Sir Shadi Lal.

which has already been referred to. There is evidence to show that the library was in the possession of the plaintiff in September, 1922, when he was forcibly dispossessed by the defendant.

The question, however, is whether the library was the private property of the late Pir, or, as urged by the defendant, formed part of the wakf property dedicated to the shrine. There is no reliable evidence that it belonged to the Pir in his private capacity, and all the circumstances point to the conclusion that it was possessed by him as the head of the Durgah. Indeed, the learned counsel for the plaintiff admits that he seeks to recover possession of it, not as his private property, but as a wakf property which appertains to the institution. The defendant can not, and does not, lay any claim to it, if it is held to be trust property.

Their Lordships think that the library should be declared to form part of the wakf property attached to the shrine, and that the decree of the Court of Appeal should be modified accordingly. As the plaintiff has established his right to be the mutwalli of the wakf property, he is entitled to recover possession of the library, together with its appurtenances as described by the Court of the Judicial Commissioner.

The result is that while Appeal No. 62 of 1934 is dismissed *in toto*, the connected appeal, No. 63 of 1934, is accepted so far as to make it clear that the library is not the private property of the plaintiff but is wakf property. He is entitled to recover possession of the library with its appurtenances and hold it in his capacity as the head of the Durgah of Jhandawala Pir. The appellant, having failed on the vital points, must pay the costs of both the appeals. Their Lordships will humbly advise His Majesty accordingly.

Solicitors for Appellant: *T. L. Wilson & Co.*

Solicitors for Respondent: *Hy. S. L. Polak & Co.*

R. C. C. *Appeal No. 63 of 1934 dismissed.*
Appeal No. 64 of 1934 allowed in part.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VARADACHARIAR AND MR. JUSTICE MOCKETT.

Anumolu Narayana Rao, minor and another by their mother and guardian Anumolu Ramadevamma .. *Appellants** (*Defendants Nos. 2 and 3*)

v.

Ghattaraju Venkatappayya and others .. *Respondents* (*Plaintiff and Defendants Nos. 4 to 7 and Nil*).

Narayana Rao *v.* Venkatappayya.

Negotiable Instruments Act (XXVI of 1881), S. 118—Promissory note by an undivided Hindu father—Suit after his death against his sons—Nature of—Onus of proving consideration on the payee—S. 118, Negotiable Instruments Act, not applicable to such a case—Evidence Act, S. 114, ill. (*c*)*—Liability of non-executants to the note.*

A suit on a promissory note can only be against the person whose name appears on it or his legal representatives and where a suit is brought on a promissory note executed by a Hindu father against his undivided sons alone after the death of the father, the sons are not sued as the maker-father's legal representatives but by virtue of their Hindu Law liability as the sons of their father on the *debt* evidenced by the promissory note and not on the note *qua* note and therefore the presumption under S. 118 of the Negotiable Instruments Act, which can only be drawn as between the parties to the note or those claiming under them, cannot be invoked by the payee or his indorsee but only the general law presumption of fact in the terms of S. 114, illustration (*c*) of the Evidence Act which the Court *may* or may not draw according to circumstances.

Nachiappa Chetty v. *Dakshinamurthy Servai*, (1915) 17 M.L.T. 232: 28 I. C. 345, doubted and distinguished as a case where the suit had been instituted during the father's lifetime.

Ayyaswami Pillai v. *Guruswami Naicken*, (1916) 3 L.W. 463; *Nataraja Naicken* v. *Ayyaswami Pillai*, (1916) 32 M.L.J. 354 and *Thankammal* v. *Kunhamma*, (1918) 37 M.L.J. 369, doubted in so far as they seem to suggest that the liability even of non-executants to the note is on the note.

When a suit is brought after the obligor's death against his heirs, the Court will, in weighing evidence, take into account the fact that the defendant was not himself a party to the transaction and the plaintiff is that way placed in a position of advantage.

Appeal against the decree of the Court of the Subordinate Judge (Additional) of Guntur in O. S. No. 61 of 1928 and petition praying that in the circumstances stated in the affidavit filed therewith, the High Court will be pleased to admit as

---

* Appeal No. 89 of 1931 and C. M. P. No. 900 of 1931. 31st August, 1936.

Narayana Rao v. Venkatappayya.

additional evidence in Appeal No. 89 of 1931 on the file of the High Court the documents marked as Exs. A and B and produced therewith.

B. Somayya and *C. Sambasiva Rao* for Appellants.

Ch. Raghava Rao for Respondents.

The Court delivered the following

Varadachariar, J.

JUDGMENTS. *Varadachariar, J.*—This appeal arises out of a suit for money, instituted by the indorsee of a promissory note (Ex. A) dated 8th August, 1925, for Rs. 5,000 executed in favour of the 4th defendant by one A. Venkatarayudu deceased (hereinafter referred to as *A. V.*). The endorsement purports to have been made on 2nd July, 1926, in consideration of the plaintiff undertaking to pay off the debt due by the 4th defendant to one G. Venkatarayudu (hereinafter referred to as *G. V.*) under Ex. B, a pronote dated 2nd August, 1924, for Rs. 4,000. It is common ground that after the suit note was endorsed to the plaintiff, a notice was sent through D. W. 4, a vakil of Guntur, demanding payment of the money, and that *A. V.* sent a reply stating that the pronote was devoid of consideration. The reply notice is not now forthcoming and it is therefore not possible to say nor is D.W. 4 able to remember what more was stated in it as to the circumstances under which and the purpose for which the note was executed. Notwithstanding this reply which repudiated liability, this suit was instituted only on the last day of the period of limitation and more than a year and a half after *A. V.'s* death.

The appellants, who were defendants 2 and 3 in the lower Court, are the two undivided minor sons of *A. V.*; the 1st defendant is his undivided younger brother. In the written statements, the defendants set out in some detail the circumstances which according to their information and belief led to the execution of the suit note. Briefly stated, the story was to the effect that in certain domestic disputes between *A. V.* and *G. V.* who were brothers-in-law, the 4th defendant a common friend and relation was requested to intercede with a view to persuade *G. V.* to take back his wife (the sister of *A. V.*) whom he had sent away or threatened to send away to *A. V.'s* house and that by way of assuring *A. V.* that both parties will act according to his advice in the matter, *A.V.* executed the suit note in favour of the fourth defendant, and a brother of *G.V.* (on *G. V.'s* part) executed a similar pronote for Rs. 5,000 in

favour of the fourth defendant. The written statement filed by the first defendant was fuller in particulars than that filed on behalf of the defendants 2 and 3 by their mother. In answer to the plaintiff's allegation that he was a holder in due course, it was stated that he had paid no consideration for the transfer and that he was not the real transferee but only acting on behalf of *G. V.*, who on account of quarrels with the defendants' family was trying to harass them by taking a transfer of this note which he knew was not supported by consideration.

It is not denied that before the institution of this suit, the relations between *G. V.* and the defendants had become very strained and had led to civil and criminal proceedings. It is also admitted by some of the witnesses examined on the plaintiff's side that *G.V.* had put away his wife (the sister of *A.V.*) and married another wife, but they would have it that this happened only after *A. V.'s* death and in consequence of the disputes between *G.V.* and the first defendant and had nothing to do with the execution of Ex. A by *A. V.*

Among the issues framed on 13th February, 1929, the first issue raised the question whether the suit note was executed by *A. V.* and was supported by consideration. The first defendant had filed his written statement on 2nd February, 1929, and on 8th April, 1929, the plaintiff's pleader endorsed on the plaint that the claim against the first defendant was given up. In explanation of this step it was stated that the first defendant was in jail in consequence of a conviction in a Sessions Case and that to avoid delay he was given up. The step that followed makes one suspicious as to the true reason for adopting this course. The later conduct of the litigation shows that the plaintiff was not prepared to examine either *G. V.* or the fourth defendant as a witness in the case. The issue as originally framed cast on the plaintiff the onus of proving execution as well as consideration; and, that would have necessitated plaintiff leading evidence in the first instance. On 16th April, 1929, a petition was filed on the plaintiff's side laying stress on the fact that the first defendant had been given up and praying that as the written statements of defendants 2 and 3 practically admitted the genuineness of the note and raised in substance a plea of absence of consideration, the 1st issue should be recast so as to throw the onus of proof on the defendants. The Court acceded to this

Narayana Rao v. Venkatappayya. — Varadachariar, J.

suggestion and, overruling the objection of the appellants to such a course, recast the issue in its present form.

At the trial, two out of the three attestors to the suit note were examined as D. Ws. 1 and 2 and they supported the defendants' version as to the origin and purpose of the note. The remaining attestor, a brother of *G.V.*, was examined as P.W. 4; and he deposed that the suit note was executed in the *kottu* or business place of the fourth defendant who paid the consideration in cash to *A.V.* Evidence to the same effect was given by P.W. 1, a brother of the fourth defendant (the promisee). The plaintiff, as P.W. 3, spoke to the transfer in his favour being supported by consideration and stated that he had executed a *paddu* (or memo.) to *G.V.* undertaking to discharge fourth defendant's debt to *G.V.* under Ex. B.

The learned Subordinate Judge expressed himself unable to accept the defendants' story as to the object of the execution of the suit pronote and held that it was supported by consideration. He also held that the plaintiff was a holder in due course and accordingly gave him a decree against the family properties in the hands of defendants 2 and 3. Hence this appeal by defendants 2 and 3. Plaintiff was also given a decree against the fourth defendant (as endorser) who appears to have submitted to the decree.

It will be convenient to deal at the outset with the question of the frame of the issue and the onus of proof, which was argued before us at some length. S. 118, cl. (*a*) of the Negotiable Instruments Act provides that every negotiable instrument shall be presumed to have been made and endorsed for consideration; and according to cl. (*g*), the holder of a negotiable instrument shall be presumed to be a holder in due course. Though this section is not, like Ss. 119 to 122, limited in terms to a "suit upon the instrument", it seems only reasonable to hold that the "*special rules of evidence*" laid down in S. 118 must have been intended to apply only as between the parties to the instrument or those claiming under them. In other cases, the presumption can only be in the terms enacted in S. 114 of the Evidence Act (*vide* Ill. *c*) which by the use of the expression 'may presume' leaves it to the Court to apply the presumption or not according to circumstances. When a suit like the present is instituted against the undivided sons of a Hindu promisor governed by

Narayana Rao v. Venkatappayya.

Varadachariar, J.

the Mitakshara law, the suit cannot be regarded as one against the *heirs* or representatives of the promisor, because it only seeks to enforce the Hindu law theory of pious obligation, in respect of property which the sons have taken by survivorship. The pious obligation can arise only on the assumption of the existence of a *debt* due by the father; and, this way of stating the position would *prima facie* throw on the creditor the onus of proving the existence of a debt.

The inappropriateness of applying even as against the undivided sons of the executant the provisions of the Negotiable Instruments Act can be shown by one or two illustrations. The sons can always avoid liability by proving the illegality or immorality of the debt; but no such defence is contemplated or permitted by the Negotiable Instruments Act. Again, take a suit by the endorsee of a promissory note executed by the father; it being presumed or proved that he is a holder in due course, the endorsee may be entitled to a decree against the executant (father) even after proof that as between the original parties to the note, there was no consideration at all. But in such a case when the absence of consideration has been proved, it will be preposterous to postulate the existence of a 'debt' and impose on the sons a pious obligation in respect thereof. If, as observed in *Krishnanand Nath Khare* v. *Raja Ram Singh*[1] one has to reconcile oneself to 'the difficulty of applying the legislative provisions of Western Law to the ancient customs and traditions of the law of the joint Hindu family', one need not add to this difficulty by an unreasonable extension of the provisions of the Negotiable Instruments Act. With reference to the possibility of regarding the 'family' itself as the 'maker' of a promissory note executed by the father or manager, *see* observations of Page, J., in *Ramgopal Ghose* v. *Dhirendra Nath Sen*[2].

It must now be taken as established by the decision of the Judicial Committee in *Sadasuk Janki Das* v. *Sir Kishan Pershad*[3] that none can be held liable on a negotiable instrument unless his liability appears on the instrument itself, in a manner recognised by law. An heir or legal representative will of course be liable if his ancestor or predecessor was liable

1. (1922) I.L.R. 44 All. 393 at 396.
2. (1927) I.L.R. 54 Cal. 380.
3. (1918) 36 M.L.J. 429: L.R. 46 I.A. 33: I.L.R. 46 Cal. 663 (P.C.).

Narayana Rao v. Venkatappayya.

Varadachariar, J.

on the instrument. Any other person can be made liable only *upon the consideration* and not on the note. If a decree had been obtained against the father, his undivided sons may perhaps become liable to discharge the decree debt (*Periasami Mudaliar* v. *Seetharama Chettiar*[1]) apart from any proof of the debt independently of the decree; and it might perhaps make no difference in such a case that the decree against the father was based on the presumption laid down in S. 118 of the Negotiable Instruments Act. Likewise, a decree thus obtained against the father may by the operation of S. 53, Civil Procedure Code of 1908, become executable against the interests of the sons in the family property, leaving it open to them to escape liability only on proof of illegality or immorality without entitling them to call upon the creditor to establish the existence of a 'debt' apart from the decree. No such special considerations apply to a case where, as in the present, no decree has been obtained against the father and the suit is brought after his death against his undivided sons. In this class of cases, it seems to me right to hold that the onus of proving the existence of a debt must *prima facie* be laid upon the creditor who can of course call in aid the presumption permissible under the general law of evidence, namely, S. 114 of the Evidence Act.

On behalf of the plaintiff-respondent, Mr. Raghava Row relied on the decision in *Nachiappa Chetty* v. *Dakshinamurthy Servai*[2] as supporting his contention that in a suit on the father's note, the burden of proof is not different in respect of the claim against the sons from that applicable to the claim against the father. On the facts it may be pointed out that in that case the suit had been instituted during the father's lifetime. This is what made it possible for the learned Judges to say that the sons had been added only to give them an opportunity of proving, if they can, that the debt was incurred for illegal or immoral purposes. Similar language cannot be appropriately used where the suit is instituted after the father's death and the sons are the only defendants. If the learned Judges intended to lay down the rule in broad terms, so as even to cover a case like the present, I am, with all respect to them, unable to concur in that view. Their conclusion

1. (1903) 14 M.L.J. 84: I.L.R. 27 Mad. 243 (F.B.).
2. (1915) 17 M.L.T. 232: 28 I.C. 345.

Narayana Rao v. Venkatappayya.

Varadachariar, J.

is mainly based on the decision in *Krishna Aiyar* v. *Krishnaswami Aiyar*[1], but as we read the judgments of Shephard and Subramania Ayyar, JJ., in the last mentioned case, their reasoning far from leading to such a conclusion seems to us to suggest the contrary result.

The actual decision in *Krishna Aiyar* v. *Krishnaswami Aiyar*[1] related to the propriety of joining in the same action a claim for a personal decree against the executant of a promissory note and a claim to recover the debt from the shares of his coparceners in the joint property of the family. While holding such joinder to be permissible, both Shephard and Subramania Ayyar, JJ., clearly recognise that the liability of the executant is on the note while the liability of the other coparceners is on the debt and is an obligation arising under the Hindu Law (see also *Seshayya* v. *Sanjivarayudu*[2] and *Ramasami Nadan* v. *Ulaganatha Goundan*[3]). I am unable to agree that in such cases the cause of action as against the two sets of defendants can be said to be the same in the sense that evidence sufficient to establish the liability of the executant would necessarily and always suffice to establish the liability of the other set of defendants. In the Full Bench judgment in *Mallesam Naidu* v. *Jugala Panda*[4] there is no doubt language employed which may seem to support the contention that the cause of action is the same as against both father and son. But the question then under discussion was whether a separate cause of action accrued as against the sons *after the father's* death or the cause of action against both accrued once for all during the father's lifetime.

Mr. Raghava Row contended that so far as the creditor was concerned, the same evidence would suffice to establish the liability both of the father and of the sons and the only difference between them was that by way of *defence* the sons can plead the illegal or immoral character of the debt. He also laid emphasis on the circumstances that the extinction of the father's liability or its unenforceability on the ground of limitation will equally avail the sons as a defence. But this contention ignores the fact that for purposes of joinder as also the continued subsistence of the liability, the decision in

1. (1900) I.L.R. 23 Mad. 597.
2. (1933) 67 M.L.J. 393.
3. (1898) 8 M.L.J. 312: I.L.R. 22 Mad. 49 at 62 and 63 (F.B.).
4. (1899) 10 M.L.J. 34: I.L.R. 23 Mad. 292 (F.B.).

Narayana Rao *v.* Venkatappayya.

Varadachariar, J.

Krishna Aiyar v. *Krishnaswamy Aiyar*[1] draws no distinction between the claim against the sons and the claim against the other coparceners of the executant; nevertheless there can be no doubt that in respect of the claim against the coparceners who are not sons, there lies on the plaintiff creditor himself, the further burden of proving that the suit debt was incurred for family purposes, cf. *Abdul Majid Khan* v. *Saraswati Bai*[2]. In this view, the decision in *Krishna Aiyar* v. *Krishnaswamy Aiyar*[1] even if it can be read as laying down that the cause of action as against the non-executants is the same as that against the executant of the note, will not support the conclusion that as against all the defendants joined in a suit of the kind there contemplated the onus of proof resting on the plaintiff will be the same.

Reliance was placed by Mr. Raghava Rao on *Ayyaswami Pillai* v. *Guruswami Naicken*[3], *Nataraja Naicken* v. *Ayyaswami Pillai*[4] and *Thankammal* v. *Kunhamma*[5] in support of the contention that the liability even of non-executants may be described as one on the note. The observations in these cases are opposed not only to the judgments in *Krishna Aiyar* v. *Krishnaswamy Aiyar*[1], *Seetharama Chetty* v. *Seshiah Chetty*[6] and *Shanmughanatha Chettiar* v. *Srinivasa Aiyar*[7] but to the principle of the decision of the Judicial Committee in *Sadasuk Janki Das* v. *Sir Kishan Pershad*[8]. The assumption in *Nataraja Naicken* v. *Ayyaswami Pillai*[4] and *Thankammal* v. *Kunhamma*[5] that the decision of the Privy Council in *Karmali Abdulla* v. *Karimji Jeevanji*[9] supports the view that even non-executants can be held liable on the bill or note seems to us with all respect unwarranted, because, as pointed out in *Shanmughanatha Chettiar* v. *Srinivasa Aiyar*[7] their Lordships expressly say that the suit should not be regarded as one on the bill but must be treated as "an action of accounting against both Rashid and Karim".

Reference has been made in some of the judgments relied on by Mr. Raghava Rao to the principle that when the loan

---

1. (1900) I.L.R. 23 Mad. 597.
2. (1933) 66 M.L.J. 65 : L.R. 61 I.A. 90 (P.C.).
3. (1916) 3 L.W. 463.
4. (1916) 32 M.L.J. 354.
5. (1913) 37 M.L.J. 369.
6. (1912) M.W.N. 1011.
7. (1916) 31 M.L.J. 138 : I.L.R. 40 Mad. 727.
8. (1918) 36 M.L.J. 429 : L.R. 46 I.A. 33 : I.L.R. 46 Cal. 663 (P.C.).
9. (1914) 28 M.L.J. 515 : L.R. 42 I.A. 48 : I.L.R. 39 Bom. 261 (P.C.).

Narayana Rao v. Venkatappayya. — Varadachariar, J.

and the note are contemporaneous, there can be no cause of action independent of the note, because that is the only contract. Judicial opinion is by no means unanimous as to this proposition (see *Chinnayya Naidu* v. *Srinivasa Naidu*[1] and *Ramasami Pillai* v. *Murugiah Padayachi*[2]), but in any event, that proposition can hold good only as *between the parties to the note* and has therefore no bearing on the question now under consideration.

In *Satyanarayana* v. *Mallayya*[3] there is no doubt an observation that the difference between the claim on the note and the claim on the debt is a verbal distinction and not one of substance. The observation may perhaps be justified where, as in *Krishna Chettiar* v. *Nagamani Ammal*[4] the distinction was insisted on merely with reference to the interpretation of the frame of the suit, though even in this respect the Privy Council in *Sadasuk Janki Das* v. *Sir Kishan Pershad*[5], insisted on the distinction. It seems to us too sweeping to say that for all purposes the distinction is unsubstantial. To take one instance, the difference will be very material when the Court is called upon to apply the provisions of Ss. 120 and 121 of the Negotiable Instruments Act.

Some of the cases above referred to also bear on the question whether the plaintiff, as endorsee of the note, is limited to the remedy available on the note or can also claim to recover the debt from the property of non-executants, on the ground of their liability under the Hindu law. Judicial opinion is divided on the point; but, as we have come to the conclusion that this appeal must succeed on the merits, even on the assumption that the plaintiff is entitled to recover the debt from the undivided sons of the executant and even on the footing that he is entitled to invoke the aid of S. 118 of the Negotiable Instruments Act, we do not pause to consider the necessity or desirability of obtaining the opinion of a Full Bench on the questions above discussed. It has to be borne in mind that when evidence has been adduced on both sides, the question of onus is a material or deciding factor only in exceptional circumstances. (cf. *Yellappa Ramappa Naik*

1. (1934) 67 M.L.J. 912.
2. (1935) 70 M.L.J. 267: I.L.R. 59 Mad. 268 (F.B.).
3. (1934) 68 M.L.J. 540: I.L.R. 58 Mad. 735 (F.B.).
4. (1915) I.L.R. 39 Mad. 915.
5. (1918) 36 M.L.J. 429: L.R. 46 I.A. 33: I.L.R. 46 Cal. 663 (P.C.).

Narayana Rao v. Venkatappayya.

Varadachariar, J.

v. *Tippanna*[1]) and that even the onus under S. 118 of the Negotiable Instruments Act need not always be discharged by *direct* evidence adduced by the defendant (*Muhammad Sharif Khan* v. *Muhammad Moazzum Ali Khan*[2], *Singar Kunwar* v. *Basdeo Prasad*[3] and *Bishambar Das* v. *Ismail*[4]). Not merely can the Court base its conclusion on the effect of the evidence taken as a whole but it may also draw adverse inferences against a party who being in a position to adduce better evidence deliberately abstains from doing so. (*Murugesam Pillai* v. *Manickavasaka Desika Gnana Sambandha Pandarasannadhi*[5], *Gurusami Nadar* v. *Gopalaswamy Odayar*[6] and *Raghavendra Rao* v. *Venkataswami Naicken*[7].)

In dealing with the evidence, we are obliged to refer at the outset to certain defects and omissions in the lower Court's discussion of it which are so material as seriously to impair the value of the judgment under appeal. Even in cases where the defendant is the heir-at-law of the obligor and as such bound by the recitals contained in the document executed by his predecessor, the Court will, in weighing the evidence, be justified in taking into account the fact that the defendant was not himself a party to the transaction and the plaintiff and those supporting the plaintiff are thus placed in a position of advantage. The disparity arising from this circumstance becomes all the greater when the defendants are minors. And yet, the learned Judge has, in this case, made strong comments on the omission of the defendants to disclose the source of their information as to the circumstances attending the execution of the suit pronote and upon the difference in details between the written statement of the first defendant and the written statement filed by the mother on behalf of defendants 2 and 3. On the other hand, it does not appear to have occurred to him at all that the omission of the plaintiffs to call the fourth defendant and *G. V.* to give evidence in the case was, in the circumstances, of great significance.

The fourth defendant was undoubtedly in embarrassed circumstances even at the time of Ex. A. His note Ex. B in favour of *G. V.* carried interest at Rs. 1-0-6 per cent. per

1. (1928) 56 M.L.J. 287: L.R. 56 I.A. 13: I.L.R. 53 Bom. 213 (P.C.).
2. (1922) 79 I.C. 464.
3. (1930) 124 I.C. 717.
4. A.I.R. 1933 Lah. 1029.
5. (1916) 32 M.L.J. 565: L.R. 44 I.A. 117: I.L.R. 40 Mad. 402 (P.C.).
6. (1919) 36 M.L.J. 568: I.L.R. 42 Mad. 629.
7. (1929) 30 L.W. 966 at 971.

mensem and had been outstanding for about a year by the date of Ex. A and yet we are asked to accept the story that the money he brought for paying off *G. V.* was with little ado lent away to *A. V.* on a promissory note carrying interest at Rs. 0-12-0 per cent. per mensem. If the plaintiff intended to rely on the statutory presumption, why should he have called the fourth defendant's brother as P.W. 1 instead of calling the fourth defendant himself. On a perusal of the evidence of P.W. 1, we are not satisfied that P.W. 1 was at all present at the execution of Ex. A. It is the story of P.W. 1 that the money lent under Ex. A was advanced at the fourth defendant's place of business and he admits that the fourth defendant kept accounts. Why have not these accounts been summoned? If the note was executed in a place like the business quarters of Guntur (as P.Ws. 1 and 4 would have it) where plenty of respectable people would have been available, why should attestors of the status of D.Ws. 1 and 2 have been called in, even if (as suggested by P.W. 4) these persons happened to be going along the road at the time. Reliance was placed by Mr. Raghava Rao on the fact that Ex. B also has been attested by D.W. 2; but we have not been told anything as to the place where it had been executed, so that we are not in a position to say whether in the circumstances he was a natural attestor to Ex. B or not.

As regards the payment of consideration by plaintiff for the transfer of Ex. A, the only evidence in support of it is that of the plaintiff himself. Even according to him, there was no payment in cash at the time but only the execution of a *paddu* in favour of *G. V.* The *paddu* has not been produced, though the plaintiff offered to produce it, if required. It is the plaintiff's story that sometime later, the *paddu* was discharged by payment; but one important circumstance bearing on this part of the case has not even been adverted to by the learned Subordinate Judge. As stated already, a notice was sent through D.W. 4 demanding payment even during the lifetime of *A. V.* The plaintiff would have us believe that D.W. 4 told him of the receipt of some reply even two or three months before the death of *A. V.* but not of the terms of the reply; but in another part of his deposition, he states that he filed this suit within 4 or 5 months after D.W. 4 told him of the receipt of a reply. The two statements are irreconcilable because this

Narayana Rao *v.* Venkatappayya.

Varadachariar, J.

suit has been filed nearly 20 months after the death of *A. V.* The importance of this part of the plaintiff's story arises by reason of its bearing on the alleged payment of cash to *G. V.*; because after receipt of a repudiation by *A. V.*, plaintiff was hardly likely to have parted with such a large amount. Even if he had undertaken a legal liability of *G. V.* by a kind of *novatio*, it is incredible that he would not have cared to inform himself what kind of reply *A. V.* gave to the notice sent through D.W. 4. The delay of 20 months in instituting the suit is hardly consistent with the hypothesis that the plaintiff had incurred any kind of liability in this connection. Even according to the plaintiff, he did not take a transfer of Ex. A in the ordinary course of commercial business or even in satisfaction of a claim he had against the fourth defendant which he had no other means of recovering. He voluntarily undertook the fourth defendant's liability under Ex. B in return for the transfer of Ex. A. The evidence of D.W. 4 is not as helpful to the Court as it might have been in view of his status; but reading through it, one cannot resist the suspicion that the notice was probably sent by him at the instance of *G.V.* himself, who was admittedly his standing client. The bearing of this circumstance on the appellant's case that plaintiff is only a benamidar for *G.V.* is obvious. In any event *G. V.* would undoubtedly have been the best witness to speak to these matters as well as to the time when differences arose between himself and his wife and attempts were made to settle those differences.

Mr. Raghava Rao contended that it was the duty of the appellants to call *G. V.* and the fourth defendant, if they thought their evidence material. We are unable to appreciate this argument, in view of the fact that according to the appellants it is *G. V.* who is really conducting the suit in the plaintiff's name and the fourth defendant has transferred the note to the plaintiff *benami* for *G. V.* and in breach of the understanding on which it had been executed. On the other hand the plaintiff has nowhere suggested that *G. V.* and the fourth defendant are antagonistic to him.

Reviewing the evidence with due regard to the considerations above set forth, we are of opinion that the evidence given by two of the attestors (D.Ws. 1 and 2) in support of the appellant's story was at least sufficient to shift the onus on to the plaintiff and that the latter has deliberately chosen not to place the best evidence before the Court. That the third

Narayana Rao v. Venkatappayya.

Varadachariar, J.

attestor (P. W. 4) supports the plaintiff does not count for much in the circumstances of this case, because that witness is a brother of *G. V.* and according to the appellants, *G. V.* is behind the plaintiff in this suit. The episode that P.W. 2 has denied does not seem to us such a vital part of the defendant's case that the discrediting of that episode on the strength of her testimony must of itself disprove the substance of the defendant's case. Her evidence has to be weighed in the light of the admitted fact that the house in which she lives has long been and still continues to be under mortgage to *G. V.*; and it is curious that she was in the first instance summoned on the appellant's side. We must also observe that we are not satisfied with the reasons given by the learned Judge for discrediting D.W. 3, who appears to be a man of respectability and not merely of 'professed' respectability. *A. V.* was no doubt the witness's aunt's daughter's son but that may itself be a reason for his being informed of domestic matters arising in *A. V.'s* family. We do not see any change as the learned Judge seems to find between the version given by D.W. 2 and that spoken to by D.W. 3. Their stories relate to different stages.

Mr. Raghava Rao rightly urged that the learned Subordinate Judge has had the advantage of seeing the witnesses before him and has expressed himself favourably impressed by the demeanour of P.Ws. 2 and 3 in the witness-box. The cases referred to in this connection do not profess to lay down a rule of *law* limiting the powers of the appellate Court but only indicate a rule of caution for its guidance. We have duly borne this caution in mind, but for the reasons we have already given, we find ourselves unable to give the same weight to the lower Court's judgment in this case as we should be disposed to do in other circumstances. In the view that we take as to the effect of the whole evidence adduced in the case, this appeal must be allowed and the suit dismissed as against defendants 2 and 3 with costs here and in the Court below, payable by the plaintiff.

A petition (C. M. P. No. 900 of 1931) has been filed on behalf of the appellants for the admission of two documents in appeal. One of them is said to be a draft of a notice alleged to have been sent by *A. V.* to P.W. 2. We see no justification for admitting such a document at this stage. The other is a certified copy of a deposition given by *A.V.* in which

Narayana Rao v. Venkatappayya.

Varadachariar, J.

he denied that any money was due under the suit pronote. That is only a self-serving statement. If all that the appellants desire to show by this document is that the plea of non-liability was put forward by *A. V.* himself and not invented by them for the purposes of this suit, that is sufficiently established by the evidence of D.W. 4 and it is therefore unnecessary to admit this deposition of *A.V.*

C.M.P. No. 900 of 1931 will accordingly be dismissed.

Mockett, J.

Mockett, J.—I agree. As to the questions of fact which arise in this appeal, I have nothing to add to what my learned brother has said. It is very apparent that the trial Judge has failed to direct his mind to the proper aspect of some of the salient features of this case, especially the remarkable omission by the plaintiff to call the fourth defendant and Gadde Venkatarayudu. It is possible no doubt that the general handling of this case was due to the frame of the issues. But in any event, when the whole facts were before the Court, the absence from the witness-box of the two persons to whom must have been known the real facts should have been a helpful guide to the Court in arriving at a decision; but this feature of the evidence seems to have been given little, if any, attention. The suggestion thrown out in this appeal that the defendants should have called the fourth defendant and Gadde Venkatarayudu is to me wholly unconvincing.

Mr. Raghava Rao and Mr. Sambasiva Rao have addressed us fully on the question of onus of proof and a number of cases have been cited. It is suggested by Mr. Raghava Rao that there is a conflict of authority with regard to the position but it seems to me that the matter now directly before us has not been concluded by authority. The whole difficulty arises from what is described in *Krishnanand Nath Khare* v. *Raja Ram Singh*[1] as "applying the legislative provisions of Western law to the ancient customs and traditions of the law of the joint Hindu family." S. 118 of the Negotiable Instruments Act is essentially a product of Western law. Long before the provisions of the Bills of Exchange Act of 1882 it was one of the rules of the Law Merchant that consideration was presumed in the case of negotiable instruments. The Indian Evidence Act

1. (1922) I L.R. 44 All. 393 at 396.

Narayana Rao v. Venkatappaya.

Mockett, J.

of 1872 allows the Court to presume that a bill of exchange was accepted or endorsed for good consideration and S. 118 of the Negotiable Instruments Act of 1881 introduces a statutory presumption that all negotiable instruments are made or drawn for consideration. An examination of the Indian case-law shows that complications which have arisen in suits apparently founded on promissory notes brought against members of joint Hindu family have been matters really of pleading and joinder of parties and causes of action. No such difficulties arise in England and no English cases have been cited in argument. It is natural that from Indian case-law should guidance be sought when a relic of the Law Merchant as to burden of proof is intermingled with the doctrine of family necessity. Much reference has been made to *Nachiappa Chetty* v. *Dakshinamurthy Servai*[1] which at first sight appears to be in favour of the respondents in the case. But it must be observed in that case the father at the time of the suit was alive and his sons were joined with him as defendants. The suit was primarily against the maker of the negotiable instrument a party to the instrument. Now in this case the essential feature of liability under a negotiable instrument is absent. The decision of the Judicial Committee in *Sadasuk Janki Das* v. *Sir Kishan Pershad*[2] is clear that in order to make a person liable on a promissory note it must be shown that his name appears upon it. The decision of the Judicial Committee in *Karmali Abdulla* v. *Karimji Jeevanji*[3] does not seem to be in the least at variance with *Sadasuk Janki Das* v. *Sir Kishan Pershad*[2]. At page 273 their Lordships point out that the action is one for an account. In this case the defendants' names do not appear upon the instrument; their father's name appears upon it but they are not sued as the legal representatives of their father. They are sued under the provisions of Hindu law by which sons are liable for their father's debts. In other words the suit is on a debt and not on the promissory note at all. When that distinction is borne in mind, it seems to me that this case presents little difficulty. My learned brother has examined the cases and I do not wish to repeat his analysis. It will be seen that the point now raised has never before come for decision in the clear cut form in which it is now presented to us. As

1. (1915) 17 M.L.T. 232: 28 I.C. 345.
2. (1918) 36 M.L.J. 429: L.R. 46 I.A. 33: I.L.R. 46 Cal. 663 (P.C.).
3. (1914) 28 M.L.J. 515: L.R. 42 I.A. 48: I.L.R. 39 Bom. 261 (P.C.).

Narayana Rao v. Venkatappayya.

Mockett, J.

stated in *Satyanarayana* v. *Mallayya*1 the difference between a claim on a promissory note and a claim on a debt may in certain cases be lacking in substance and I think Ramesam, J., in delivering the judgment of the Full Bench had such circumstances in mind. But in a case such as is before us the form of the suit is of vital importance to the defendants and for the reason that if the burden is on them to negative the acts of their father they are in a difficult if not in a hopeless position. The defendants are mere children without any knowledge of the facts. The plea therefore in this case as to the form of the action is, as I have said, of great importance and I imagine must always so be in suits brought after the death of the father against the sons ostensibly on a promissory note. As pointed out by my learned brother, some doubt has arisen in this matter owing to the observations made in *Ayyasami Pillai* v. *Guruswami Naicken*2, *Nataraja Naicken* v. *Ayyaswami Pillai*3 and *Thankammal* v. *Kunhamma*4. I am inclined however to think that Coutts-Trotter, J., in *Ayyaswami Pillai* v. *Guruswami Naicken*2 had in mind the importance of the promissory note rather as evidence of the debt and in none of these cases was the question of burden of proof given any prominence. So far as *Nataraja Naicken* v. *Ayyaswami Pillai*3 is concerned, personally I see nothing very extraordinary in a suit being framed on the note against the maker and under the Hindu law against the members of the family. On the other hand I find it much more difficult to contemplate a suit on a negotiable instrument against anybody not a party to it. The distinction as to the form of pleading is pointed out by Page, J., in *Ramgopal Ghose* v. *Dhirendra Nath Sen*5 where a suit in the alternative is discussed by the learned Judge at p. 393. In *Seshayya* v. *Sanjivarayudu*6, Cornish, J., indicates the two sorts of liability—by the maker on the note and by the coparcener on the debt under Hindu law. No doubt the observations in reported cases suggest a difference of opinion on the subject. In this respect it must be repeated that the short question as to onus of proof in such a case as this was never considered in any of those cases and a careful examination of the cases shows that what was being considered was the ques-

1. (1934) 68 M.L.J. 540: I.L.R. 58 Mad. 735 (F.B.).
2. (1916) 3 L.W. 463.
3. (1916) 32 M.L.J. 354.
4. (1913) 37 M.L.J. 369.
5. (1927) I.L.R. 54 Cal. 380.
6. (1933) 67 M.L.J. 393.

Narayana Rao v. Venkatappayya. Mockett, J.

tion of the sons' liability for the amount of the note. But it has now to be considered and answered and I take the view that to hold that the onus of proof as to consideration rests on a defendant sued on a promissory note on which his name does not appear is contrary to the view of the Judicial Committee as clearly expressed in *Sadasuk Janki Das* v. *Sir Kishan Pershad*[1]. I find it impossible to suppose that the presumption as to consideration was intended to operate except as between parties to a negotiable instrument. Although Hindu law may make a defendant son liable for the amount of a negotiable instrument signed by his father, nothing except his written name thereon can make him a party thereto, liable as a party, and subject to the statutory presumption affecting consideration between parties. When as here the signatory father is dead and it is sought to make any one other than his legal representatives as such liable for money lent under a promissory note, it seems to me that any subtleties found by the Court in *Nataraja Naicken* v. *Ayyasami Pillai*[2] disappear and the suit can only be on the debt of which the promissory note is evidence and personally I have little difficulty in holding that that being so the burden of proof from the beginning must be on the plaintiff to prove the debt like any other debt.

The above view is not, I think, contrary to any actual decision of this Court, nor does it affect any question of liability for a debt; and it is only necessary to state it in a case such as this when a nice question of burden of proof involves the allocation of a form of action to its precise legal category.

S. V. V. — *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATARAMANA RAO.

Sri Perarulala Ramanuja Jeer Swamigal .. *Petitioner* (Defendant).*

v.

T. S. Pichu Ayyangar .. *Respondent (2nd Plaintiff).*

Ramanuja Jeer Swamigal v. Pichu Ayyangar.

Madras Hindu Religious Endowments Act (II of 1927), Ss. 62 and 63—Petition for framing a scheme—Board's decision rejecting the petition—Suit in Court to set aside the decision of the Board—Scope of S. 63.

Where under S. 62 of the Hindu Religious Endowments Act a petition was put in by some of the residents of a village for the settlement of a scheme for a temple alleging mismanagement on the part of a trustee and the Board

1. (1918) 36 M.L.J. 429: L.R. 46 I.A. 33: I.L.R. 46 Cal. 663 (P.C.).
2. (1916) 32 M.L.J. 354.

* C.R.P. No. 959 of 1936. 7th January, 1937.

Ramanuja Jeer Swamigal *v.* Pichu Ayyangar.

after making the necessary enquiry came to the conclusion that no case had been made out for the framing of a scheme and rejected the petition and a suit was filed for setting aside the said order and for framing a scheme.

Held, that when the Board declined to frame a scheme there would be no use in a Court setting at naught that discretion because there was no power in the Court to compel the Board to frame a scheme. Unless the Court had that power it would be futile to set aside such an order.

Before the passing of the Hindu Religious Endowments Act, the provision so far as mofussil Courts in the Presidency were concerned, for the settlement of schemes relating to religious endowments was S. 92, Civil Procedure Code. A comparison of several sections of the Act will clearly show that the legislature dealt with every aspect of the administration and management of the religious endowments in the same manner as S. 92 was intended to deal with. For the consent of the Advocate-General, the consent of the Board has now been substituted. Turning to Ss. 62 and 63 of the Act, it will be seen that the power to frame a scheme for an excepted temple is solely vested in the Board which power was formerly vested in the Court. Previous to the passing of the Act when the Advocate-General declined to give sanction, there was no power in the Court to interfere with it. There was no alteration in the law intended when the consent of the Board was substituted for that of the Advocate-General. And further there was the additional fact that as the refusal by the Advocate-General was not final and it was open to him to alter his decision and subsequently sanction the institution of the suit, similarly it would be open to the Board to reverse their decision and come to the conclusion that a scheme may be necessary.

Petition under S. 115 of Act V of 1908 and S. 107 of the Government of India Act, praying the High Court to revise the order of the District Court of Tinnevelly dated the 20th day of August, 1936, and made in O. S. No. 4 of 1935.

B. Sitarama Rao and *K. E. Rajagopalachari* for Petitioner.

K. V. Sesha Aiyangar for Respondent.

The Court delivered the following

JUDGMENT:—The question raised in this revision petition is one of some importance. It relates to the construction of S. 63 of the Madras Hindu Religious Endowments Act. Under S. 62 of the Act the petition was put in by some of the residents of Tirukkurangudi village, Nanguneri Taluk, Tinnevelly District, for the settlement of a scheme for the temple of Sri Alagianambirayar, Tirukkurangudi alleging mismanagement on the part of the trustee. The Hindu Religious Endowment Board after making the necessary enquiry came to the conclusion that no case has been made out for the framing of a scheme and rejected the petition. This suit has been filed for setting aside the said order and for framing a scheme. A preliminary issue was raised whether a suit lies under S. 63,

Ramanuja Jeer Swamigal *v.* Pichu Ayyangar.

cl. 4 of the Act. The learned District Judge has held that such a suit lies. It is against the said order that the above revision petition has been filed. It is contended by Mr. Sitarama Rao that on a proper construction of Ss. 62 and 63 of the Act when the Board in the exercise of its discretion declines to frame a scheme the Court has no jurisdiction to interfere with it. The question is, is this contention tenable? Under S. 63, cl. 4 the trustee or any person having interest is entitled to institute a suit in a Court of law to modify or set aside an order of the Board under the said section. The point in controversy now is whether an order by tbe Board rejecting the petition to frame a scheme would be an order within the meaning of S. 63. S. 63 does not expressly provide for such an order. But it is argued that it does by implication. It is contended by Mr. K. V. Sesha Aiyangar that when S. 63 empowers the Board by order to settle a scheme it necessarily carries with it the power by order to refuse to settle a scheme. To appreciate this contention it is necessary to examine the scope and object of these sections. Before doing so, it is desirable to look into the state of the law at the time the Act was passed and the necessity for the enactment. Before the passing of the Hindu Religious Endowments Act the provision so far as the mofussil Courts in the Presidency are concerned, for the settlement of schemes relating to religious endowments is S. 92, Civil Procedure Code. Under that section the Advocate-General or two or more persons having an interest in the trust and having obtained the consent in writing of the Advocate-General may institute a suit for getting any of the reliefs mentioned in that section. It will be noticed that all the reliefs relate to the proper administration and superintendence of the endowments dealt with by the section and the procedure indicated therein was made mandatory. Before any suit can be instituted by persons other than the Advocate-General, the consent of the Advocate-General is a condition precedent. The Advocate-General of his own motion or on the representation of persons interested in the trust after making an enquiry must come to a conclusion that in the interests of the trust a scheme is necessary. If as a result of the enquiry he is not satisfied as to the necessity for framing a scheme no suit can be instituted and no relief can be given. Nor can any Court of law compel the Advocate-General to give sanction. It has been even held that no writ

Ramanuja Jeer Swamigal v. Pichu Ayyangar.

analogous to that of mandamus under S. 45 of the Specific Relief Act can issue to him. The reasons given by him for his refusal cannot be canvassed in a Court of law. The principle underlying that provision is that the Advocate-General represents the Crown who as *parens patriae*, is the guardian of all the charities. Therefore he is the competent person to judge whether it is in the interests of the institution that action should be taken. Again if the Advocate-General sanctions the institution of the suit the Court is not bound to frame a scheme. The Court also is invested with a discretion to go into the whole matter and finally come to the conclusion that a scheme may or may not be necessary. If it comes to the conclusion that a scheme is necessary it will frame a scheme; otherwise not. Such was the state of the law on the date of the passing of the Act. It was felt that Courts should as far as possible be divested of the burden of superintending religious endowments, that their administration and superintendence should be vested in a body of persons who by experience, habits of thought and their acquaintance with the local conditions would be better able to frame suitable schemes and see that the religious endowments are properly administered and duly appropriated for the purpose for which they were made. By the passing of the Hindu Religious Endowments Act, S. 92 has been repealed and the only way to get reliefs provided in that section is by resorting to the procedure indicated in the Act. A comparison of the several sections of the Act will clearly show that the legislature dealt with every aspect of the administration and management of the religious endowments in the same manner as S. 92 was intended to deal with. For the consent of the Advocate-General the consent of the Board has now been substituted. Under S. 73 of the Act the Board or any person having obtained the consent of the Board may institute a suit for some of the reliefs which were previously obtained under S. 92. In regard to the framing of the scheme the jurisdiction has been conferred upon the Board itself. The underlying policy of the Act is as already stated that the jurisdiction of the Court to frame a scheme should be taken away and should be vested in a body of persons better competent to do so. If we now turn to Ss. 62 and 63 of the Act it will be seen that the power to frame a scheme for an excepted temple is solely vested in the Board which power was formerly vested in a Court. In lieu of the

safeguard which was provided in S. 92 before initiating proceedings for a scheme, *viz.*, the decision of the Advocate-General as to *prima facie* proof of its necessity, the decision of the Board has been substituted in Ss. 62 and 63. Like the Advocate-General in S. 92, the Board must be satisfied that a scheme is necessary. For that purpose it can of its own motion or on the representation of persons interested in the trust who should be not less than 20 in number make an enquiry as to the necessity of a scheme. It is only when it is satisfied that the trustee has mismanaged or in the interests of the proper administration a scheme should be settled, jurisdiction is conferred upon the Board by order to settle a scheme. If it is not satisfied, it has no jurisdiction to frame a scheme. The order that is specifically referred to in S. 63 is only an order settling a scheme. And there is no provision in S. 62 or 63 providing for an order by the Board that a scheme is necessary or not. S. 63 will not come into operation till the initial decision by the Board that a scheme is necessary. Such an order is not one contemplated by S. 63. For example if the Board itself takes the initiative there is no provision in S. 62 or 63 to pass any order that a scheme is necessary or is not necessary because if it comes to the conclusion that a scheme is necessary it straightaway assumes jurisdiction under S. 63. The order of rejection which is passed after the preliminary enquiry on the petition under S. 62 is an order which it is competent to pass as a body empowered to deal with the matter in the ordinary course of its functions. In S. 63 only three orders are mentioned, namely, (1) order settling a scheme, (2) order modifying a scheme, and (3) order cancelling the scheme. S. 63 (4) mentions 'every order of the Board under this section'. *Prima facie* it must relate to the three orders mentioned in S. 63, cls. 1 and 3. A reference to the statutory rules made in pursuance of the power conferred by the Act also lends support to the view that the order contemplated in cl. 4 can only refer to those three orders and not to any order stating that a scheme is necessary or not. S. 63, cl. 4 says that every order of the Board shall be published in the prescribed manner, and the rule made by the Local Government in 1926 after the passing of the Hindu Religious Endowments Act of 1925 in regard to the publication ran in these terms:

" Every order of the Board settling, modifying, or cancelling a scheme under S. 53 or S. 59 (corresponding to S. 63 of the present Act) shall be

Ramanuja Jeer Swamigal *v.* Pichu Ayyangar.

published in the notice-board of the temple or math affected by the order and in the District gazette of the District or Districts in which the temple or math is situated; where the order affects a temple, it shall also be published in the notice-board of the committee, if any, within whose jurisdiction the temple affected is situated".

Thus it will be seen that only three orders are required to be published, *i.e.*, orders settling, modifying or cancelling a scheme. This rule read in conjunction with S. 63, cl. 4 shows that every order of the Board under this section only comprises the three above orders and no other. In the case of doubtful or difficult construction of the Act it is permissible to look into the statutory rules framed in pursuance of the authority conferred under the Act. The rule of construction is thus stated in Craies on Statute Law at page 144:

" When the language of an Act is ambiguous and difficult to construe the Court may, for its assistance in its construction, refer to rules made under the provisions of the Act, especially where such rules are by the statute authorising them directed to be read as part of the Act".

In support of this rule reliance is placed on the observations of Mellish, L.J., in Ex parte *Wier*[1], *viz.*:

" But we are of opinion that, where the construction of the Act is ambiguous and doubtful on any point, recourse may be had to the rules which have been made by the Lord Chancellor under the authority of the Act, and if we find that in the rules any particular construction has been put on the Act it is our duty to adopt and follow that construction".

As already pointed out by me, previous to the passing of the Act when the Advocate-General declined to give sanction, there was no power in the Court to interfere with it. I do not think that there was any alteration in the law intended when the consent of the Board was substituted for that of the Advocate-General. And further there is the additional fact that as the refusal by the Advocate-General was not final and it was open to him to alter his decision and subsequently sanction the institution of the suit, similarly it would be open to the Board to revise their decision and come to the conclusion that a scheme may be necessary. It is contended by Mr. Sesha Aiyangar that if the Court is invested with a power of cancelling a scheme and in doing so can go into the grounds on which a scheme was considered necessary it would have been contemplated by the legislature that the Court can also go into the grounds of refusal. I am not able to agree with this view. When the Board settles a scheme it does interfere with vested rights and therefore a power of revision is conferred on the Court to see that such rights have not been unduly interfered

1. (1871) 6 Ch. A. 875 at 879.

Ramanuja Jeer Swamigal v. Pichu Ayyangar.

with. The power now given to the Court is the same which was exercised by it previously, namely, where the Advocate-General sanctions the institution of the suit for framing a scheme, still the Court can decline to frame a scheme. There is also another reason which is apparent from the provisions of S. 63 and points to the conclusion that it was not in the contemplation of the legislature that the Court should interfere with the exercise of discretion by the Board in refusing to frame a scheme. So far as the power of interference of the Court is concerned, it can only modify a scheme which had already been made by the Board. It has no power to frame a scheme itself. It can cancel a scheme framed by the Board but it cannot itself frame a scheme though it might modify it. So when the Board declines to frame a scheme there is no use in the Court setting at naught that discretion because there is no power in the Court to compel the Board to frame a scheme. Unless the Court has got that power it would be futile to set aside such an order. Mr. Sesha Aiyangar contends that such a power can be deemed to be implied is suggested by the wording of S. 65. I do not see how, when S. 65 says:

"Any scheme of administration which has been settled by a Court under S. 63".

It only means a scheme which has been modified by the Court under S. 63 and not a scheme which has been settled by itself. Before a Court can function there must be a scheme framed by the Board or else it has no jurisdiction to deal with it.

Mr. Sesha Aiyangar relied upon a decision of the Privy Council in *Hadjee Abdoollah Reasut Hossein* v. *Hadjee Abdoollah*[1] where their Lordships of the Privy Council were construing S. 76 of the Registration Act (VIII of 1871) which provided that no appeal lay from an order made under that section. Their Lordships of the Judicial Committee held that an order against which no appeal can be preferred would apply to an order rejecting as well as to an order admitting an application for registration. Similarly Mr. Sesha Aiyangar contended the order refusing to settle a scheme must be deemed to have been passed under S. 63. As I have already pointed out an order allowing the petition to frame a scheme is not an order contemplated under S. 63. Therefore that decision has

1. (1876) L.R. 3 I.A. 221: I.L.R. 2 Cal. 131 (P.C.).

Ramanuja Jeer Swamigal v. Pichu Ayyangar.

no bearing on the facts of this case. I am therefore of opinion that the Court has no jurisdiction to set aside an order made by the Board rejecting the petition under S. 62 of the Act. I therefore allow the revision petition and set aside the order of the learned District Judge and dismiss the suit. But in the circumstances I make no order as to costs.

K. C. — *Petition allowed and Order set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATARAMANA RAO.

G. Ramiah Baghavathar .. *Petitioner* (Plaintiff)*

v.

Chinna Karuppannan Servai and another .. *Respondents (Defendants).*

Ramiah Baghavathar v. Chinna Karuppannan Servai.

Lease—Lessee holding for term—Sub-lease to another for the same period—Termination of term of main lease—Lessee not surrendering to landlord—Sub-lessee in use and occupation—Renewal of lease in his favour—Suit for arrears of rent against original lessee for the period up to renewal—Lessee suing his prior sub-lessee—How far liable.

Where the plaintiff obtained a lease from a Devasthanam for a period of three years from 7th October 1929 and in anticipation of getting the new lease he sub-leased the property in March of that year to the defendants for a period of three years and the lease expired on 7th October, 1932, but the plaintiff did not surrender possession of property on the expiry of the term nor the defendants, but the defendants succeeded in getting a renewal of the lease from the Devasthanam directly under a deed dated 27th April 1933, and the Devasthanam sued the plaintiff for arrears of rent and possession and got a decree, and hence the plaintiff in his turn brought the present suit against the defendants for the recovery of the arrears of rent, etc., due to him,

Held, that even though the plaintiff's title might have expired by the termination of the term of the lease, still until the defendant had shown that he had renounced the obligation of surrendering possession to his lessor by commencing to hold the property under some other person either the landlord of the plaintiff or a person claiming by title paramount or by delivering possession to them, the mere fact that the plaintiff's title had expired was no defence to a suit for arrears of rent or for damages. Therefore a decree to the plaintiff for arrears of rent as and by way of damages for use and occupation from the date of termination of the sub-lease up to the date of renewal in favour of defendants should be passed.

Petition under S. 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the Additional Subordinate Judge of Madura dated 9th March, 1935 and passed in S. C. S. No. 381 of 1934.

N. R. Govindachariar for Petitioner.

V. Ramaswami Aiyar for Respondents.

---

* C. R. P. No. 955 of 1935. 15th December, 1936.

Ramiah Baghavathar v. Chinna Karuppannan Servai.

The Court delivered the following

JUDGMENT.—The question involved in this revision petition is the right to recover arrears of rent by the plaintiff from the defendants from March, 1932. The plaintiff obtained a lease from the Koodal Alagar Devasthanam on 7th October, 1929, for a period of three years. Even prior to the said lease he was holding the lands on another lease which was to expire on the date of the new lease. In anticipation of getting the new lease he sub-leased the property to the defendants for a period of three years. The lease expired on 7th October, 1932, but the plaintiff did not surrender possession of the property on the expiry of the term; neither the defendants who were holding a portion of the property under the said sub-lease delivered possession to the plaintiff. It transpires from the evidence that the plaintiff was attempting negotiations with the Devasthanam for the renewal of the lease and the defendants were also making similar attempts for getting the lease to themselves and ultimately the defendants succeeded in getting the lease from the Devasthanam under Ex. I which is dated 27th April, 1933. It is also clear from the evidence that the plaintiff was sued by the Devasthanam for recovery of arrears of rent and possession on the ground that he ought to have surrendered possession on the expiry of the term and that he failed to do so. In that suit a decree for rent was passed against the plaintiff. The plaintiff has now filed the present suit for recovery of arrears of rent and also for certain damages in respect of the contract for milling paddy which the defendants entered into with the plaintiff and also for certain items due on account. The learned Subordinate Judge found as a fact that the plaintiff was not entitled to the moneys alleged to be due to him in respect of the dealings, and in regard to arrears of rent he was of the opinion that the lease in favour of the plaintiff had expired and he was not entitled to sue and claim relief in respect thereof. It seems to me that this view is unsound. One of the obligations of the lessee is to deliver possession of the premises demised to the lessor from whom he derived possession and until that obligation is fulfilled, he was bound to pay him either rent or damages for the use and occupation. Of course, it is open to him to show that his title having expired he has surrendered possession to the original landlord from whom the lessor derived possession or to a person claiming by title paramount and in such cases it has been

Ramiah Baghavathar v. Chinna Karuppannan Servai.

held that no question of estoppel arises, but when he is not able to plead a valid defence to his obligation to surrender possession, it will not be open to him to resist the demand made by his lessor for damages for the use and occupation during the period he was in possession until he surrendered possession to the lessor. Mr. Ramaswami Ayyar relied on two decisions reported in *Lodai Mollah* v. *Kally Das Roy*[1] and *Valia Muhammad* v. *Savakutti Koyi*[2] to the effect that it is open to a lessee after the expiration of the term to plead that the lessor's title has expired in a suit for rent. In my opinion, the proposition is very widely stated in those cases because it will be seen from the statement of the law in Everest and Strode's Law of Estoppel that a lessor by merely showing that the title has expired cannot escape the obligations he was under his lease. The rule is thus stated in the 3rd edition of the said book (p. 202):

"A tenant is not estopped from showing that his landlord's title expired at a period subsequent to the date when the tenant was let into possession; but the tenant must however in order to be allowed to show the expiration of his landlord's title, solemnly renounce such title and commence a fresh holding under some other person".

Therefore, even though the plaintiff's title might have expired by the expiration of the term of the lease, still until he has shown that he has renounced the obligation of surrendering possession to him by commencing to hold the property under some other person either the landlord of the plaintiff or a person claiming by title paramount or by delivering possession to them, the mere fact that the plaintiff's title has expired is no defence to a suit for arrears of rent or for damages. I therefore reverse the decree of the lower Court so far as this matter is concerned, and direct that a decree be given to the plaintiff for arrears of rent as and by way of damages for use and occupation from 1st March, 1932 up to the date Ex. I came into effect. For this purpose, the case is remanded to the lower Court for disposal and for the necessary decree being passed in favour of the plaintiff, but in the circumstances I direct each party to bear his own costs of this revision petition.

K.C. —— *Case remanded.*

---

1. (1881) I.L.R. 8 Cal. 238.
2. (1933) 66 M.L.J. 355.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

V. S. Subramania Asari .. *Petitioner** (*2nd Defendant-Petitioner*)

v.

Ramaswami Pillai .. *Respondent* (*Plaintiff-Respondent*).

Subramania Asari *v.* Ramaswami Pillai.

Sale of mortgaged property—Applications under O. 21, r. 89 of Civil Procedure Code to set aside sale as well as under O. 34, r. 5, Civil Procedure Code—Court holding that as the application was filed after 32 days it was out of time—Limitation Act (IX of 1908), Art. 166, how far governing when special provision of the Code to the contrary existed—Confirmation of sale by order was the criterion and not mere lapse of thirty days—Application filed before order specifying confirmation of sale was within time.

Article 166 of the Limitation Act, a general provision, applying to many applications under the Code and not only to applications under O. 21, rr. 89 to 91, cannot override the special provisions of any particular section or rule of Civil Procedure Code to the contrary. If therefore O. 34, r. 5 gives a time other than that provided by Art. 166, the special provision must prevail.

Where a sale of a mortgaged property was held and 32 days later the petitioner (the mortgagor) put in an application purporting to be under O. 21, r. 89 to set aside the sale, depositing the whole amount *plus* five per cent. for the auction-purchaser and costs, and the Court held that under Art. 166 of the Limitation Act the application was not in time and dismissed it, but subsequently the petitioner filed a review petition stating his application was not one under O. 21, r. 89 but one under O. 34, r. 5, and the District Munsiff who heard it felt that under O. 21, r. 92 the Court, in circumstances like the present as well as in general where the application had not been put in under O. 21, rr. 89 to 91, was bound to order confirmation of the sale.

Held, that it was wrong to hold that as the Court was bound to confirm a sale after 30 days the sale automatically became confirmed after 30 days. That might be valid if the wording of O. 21, r. 92 did not make it clear that automatic confirmation did not take place. On the other hand O. 21, r. 92 and S. 65 of the Code contemplated the passing of an order of confirmation and it was the passing of that order which made the sale absolute; so that it was not the lapse of 30 days that confirmed the sale but the passing of an order which could not be passed within 30 days. As the application was made here before the sale had been confirmed by an order, therefore under O. 34, r. 5, the Court was bound to order the mortgagee to receive the sum of money tendered and to give up the documents contemplated by O. 34, r. 5 which supported his title.

Petition under S. 115 of Act V of 1908 and S. 107 of the Government of India Act praying the High Court to revise the order of the Court of the District Munsiff of Villipuram dated 18th January, 1935, and made in M.P. No. 1474 of 1934 in O.S. No. 45 of 1928.

K. Rajah Aiyar and *T.A. Ramaswami Reddi* for Petitioner.

V. Viswanatha Sastri for Respondent.

* C. R. P. No. 694 of 1935. 26th January, 1937.

Subramania Asari *v.* Ramaswami Pillai.

The Court delivered the following

JUDGMENT.—The respondent in this application is the mortgagee and the petitioner the mortgagor. The mortgagee brought a suit for sale and obtained a preliminary decree and then for a final decree. A sale of the property was held and 32 days later the petitioner put in an application purporting to be under O. 21, r. 89, to set aside the sale, depositing the whole mortgage amount *plus* five per cent. for the auction-purchaser and costs. The Court held that under Art. 166 (although the provision of the Limitation Act is not mentioned) the application was not in time and dismissed it. The petitioner then filed a review petition stating that his application was not one under O. 21, r. 89, but one under O. 34, r. 5. No serious objection to the hearing of this review application was made on the ground that a review did not lie and after full discussion of the applicability of O. 34, r. 5, O. 21, rr. 89 to 92, and Art. 166 of the Limitation Act, the Court passed an order dismissing the review petition. Against the order on the review petition, this Civil Revision Petition has been filed.

It is argued in support of the lower Court's order that a review petition before a judge other than the one who passed the first order was not maintainable; but I do not think that that is now of any great importance because no serious objection was raised on this ground before the lower Court and the Court dismissed the application not on the technical ground but on the ground that under O. 21, r. 92 and Art. 166 of the Limitation Act the original application was properly dismissed. The petitioner could no doubt have filed a Civil Revision Petition against the original order, with another petition to excuse delay and under the circumstances, in view of the fact that he had been *bona fide* engaged in the prosecution of the review petition, the delay would most probably have been excused. He would of course have adopted that procedure if the learned District Munsiff had dismissed the review application on the ground that a review did not lie. In view of the fact that the District Munsiff went into the point fully in the second application and there was no consideration of the applicability of O. 34, r. 5 in the first application, a Civil Revision Petition was not unnaturally preferred against the second petition. The mere fact that the petitioner preferred to file a Civil Revision Petition against the order passed on the review application and not on the first

Subramania Asari v. Ramaswaim Pillai.

order ought not to preclude this Court from passing an order which it deems to be in the interests of justice.

On the question as to how far O. 34, r. 5 modifies the procedure to be adopted in applications to set aside sales, I think it must first be stated that Art. 166 a general provision applying to many applications under the Code and not only to applications under O. 21, rr. 89 to 91, cannot override the special provisions of any particular section or rule of the Civil Procedure Code, to the contrary. If therefore O. 34, r. 5 gives a time other than that provided by Art. 166, the special provision must prevail. O. 34, r. 5 states that where at any time before the confirmation of the sale made in pursuance of a final decree certain moneys are deposited in Court, the plaintiff shall be ordered, to hand over the document referred to, in the decree and do other things which are necessary to support the defendant's title to the hypothecated property. The learned District Munsiff says that under O. 21, r. 92, the Court, in circumstances like the present as well as in general where the application has not been put in under O. 21, rr. 89 to 91, is bound to order confirmation of the sale. That no doubt is a correct interpretation of O. 21, r. 92; but the fact remains that until that order is passed no confirmation takes place, and, as will be seen, from the wording of O. 21, r. 92 and S. 65, Civil Procedure Code, until confirmation takes place the sale does not become absolute, which means, as various decisions have laid down, that the property remains with the judgment-debtor. It is argued that where O. 34, r. 5 speaks of the confirmation of sale, it must mean the date on which the sale can be confirmed. That is not what O. 34, r. 5 says. I see no reason why the section should not be given its plain interpretation. The District Munsiff seems to be of opinion that as the Court is bound to confirm the sale after 30 days, the sale automatically becomes confirmed after 30 days. That argument might be valid if the wording of O. 21, r. 92 did not make it clear that automatic confirmation did not take place. O. 21, r. 92 contemplates the passing of an order of confirmation and it is the passing of this order which makes the sale absolute; so that it is not the lapse of 30 days that confirms the sale but the passing of an order which cannot be passed within 30 days. I am therefore of opinion that the District Munsiff was wrong in holding that this application was out of time. It was made before the sale had been confirmed and therefore under O. 34,

Subramania Asari *v.* Ramaswami Pillai.

r. 5, the Court was bound to order the plaintiff to receive the sum of money tendered and to give up the documents contemplated by O. 34, r. 5 which support his title.

As all these proceedings have been instituted in a large measure on account of the negligence of the petitioner, I think it would be unfair to mulct the respondent with all the costs. The petitioner will get his costs in this Court but in the other proceedings each party will bear his own costs.

K. C. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VARADACHARIAR.

Karaia Nachi Bivi .. *Appellant** (*Plaintiff*)

v.

Allapichai *alias* Nyna Muhammad Marackair (since deceased) and others .. *Respondents* (*Defendants and Nil*).

Karaia Nachi Bivi *v.* Allapichai.

Court-Fees Act(VII of 1870 as amended in Madras), S. 7 (v) and Sch. II, Art. 17-B—Mahomedan co-sharers—Claim for possession of share in alienated as well as unalienated properties—Proper court-fees.

The well-established principle is that for purposes of the calculation of court-fee, the Court must take the allegations in the plaint to be *prima facie* correct.

Where the plaintiff, a Muhammadan lady, sued the first defendant alleging that herself and the first defendant were co-sharers in certain family properties, that she was receiving paddy for her share in the undivided properties, that she came to know recently of certain alienations fraudulently effected by the first defendant, and claimed possession of her share in the entire properties including the alienated as well as unalienated.

Held, that as matters then stood, the plaintiff was entitled to insist that the court-fee should be assessed on the basis on which she had framed her plaint. Therefore the court-fee payable should be computed under Art. 17-B of Sch. II of the Court-Fees Act as amended in Madras so far as the unalienated properties in the possession of the first defendant, and under S. 7 (*v*) in respect of the plaintiff's share in the properties which had been alienated by the first defendant.

Appeal against the decree of the District Court of Tinnevelly in A. S. No. 91 of 1931 preferred against the decree of the Court of the District Munsiff of Tinnevelly in O. S. No. 19 of 1931 (O. S. No. 196 of 1929 District Munsiff's Court, Srivaikuntam).

One Muhammad Thambi Maracayar executed a settlement deed by which he settled the A schedule properties in the suit on his son

* S.A. No. 913 of 1932. 2nd December, 1936.

Allapichai, the first defendant, the B schedule properties on his wife Ibrahim Bibi, for life, with remainder to the first defendant and the 'C' schedule properties on Mymoon Bivi, his daughter, who sold it to first defendant on 17th March, 1914. After her death, her daughter filed the present suit for partition, alleging that the deed of settlement of Muhammad Thambi Maracayar was invalid and not acted upon, and that the sale deed dated 17th March, 1914, was a nominal transaction, that the plaintiff and first defendant were co-sharers, and that the plaintiff was receiving paddy for her share of the undivided properties, and that recently she had come to know that the first defendant had alienated some of the properties fraudulently. The plaintiff paid court-fee of Rs. 15 under Art. 17-B. The Courts below had held that the proper court-fee was under S. 7 (5) on all the properties.

T. L. Venkatarama Aiyar for Appellant.

T. M. Ramaswami Aiyar and *Miss M. A. Janaki.* (Court Guardian for Respondents.

The Court delivered the following

JUDGMENT.—This second appeal raises a question as to the court-fee payable on the plaint. There is no doubt room for some suspicion that the plaint has been so drafted as to avoid inconvenient facts and make it appear that it is not necessary to pay a higher court-fee than the plaintiff paid in the first instance. But I do not think that even such a suspicion will justify the departure from the well-established principle that for purposes of the calculation of court-fee, the Court must take the allegations in the plaint to be *prima facie* correct.

On the pleadings in the case, I think a distinction ought to have been drawn between the properties which have admittedly been alienated by the first defendant and properties which are in his possession in his own right. So far as the former set of properties is concerned, the plaintiff cannot claim to treat the alienee's possession as the possession of a co-tenant and for this purpose it can make no distinction even if physical possession of such properties happens to be with the first defendant himself as the result of any arrangement between the first defendant and the alienees. But as regards the properties which have not been alienated by the first defendant I am not able to agree in the view taken by the Courts below, because in paragraphs 5 and 6 of the plaint there is a distinct allegation that the first defendant has all along been giving either 15 kottahs or 11¼ kottahs of paddy as representing the share of

Karaia Nachi Bivi v. Allapichai.

the income due to the plaintiff's predecessor in title and to the plaintiff.

As regards the documents referred to in paragraphs 8 and 9 of the plaint, the Court must leave it to the plaintiff to decide whether or not she is prepared to take the risk of insisting on proceeding with the suit without a prayer to have them set aside. If she is right in her contention that they are totally inoperative and they may be ignored, there is no reason for calling on her to pay any court-fee in respect of an implied prayer relating to them. If on the other hand it turns out that without getting them set aside the plaintiff cannot succeed in this suit she takes the risk of the suit failing having so framed the plaint as not to ask for necessary declarations.

In the circumstances of the case I can only say that any Court will be justified in refusing to show any indulgence to the plaintiff if later on the plaintiff prays for any amendment of the plaint according to eventualities.

As matters now stand, the plaintiff is entitled to insist that the court-fee should be assessed on the basis on which she has framed her plaint. I must therefore set aside the orders of the Courts below and send the case back to the trial Court with directions to receive the plaint on payment of court-fee under Art. 17-B of the second schedule, so far as the unalienated properties in the possession of the first defendant are concerned and on payment of court-fee under cl. 5 of S. 7 in respect of the plaintiff's share of the properties which have been alienated by the first defendant.

Mr. Venkatarama Aiyar contends that even in respect of the alienated properties, the plaintiff should not be called upon in the first instance to pay court-fee under cl. 5 because it may be possible finally to allow the alienees to remain in possession of those properties by allotting them to the share of the alienor. I do not think that this consideration can be taken into account in dealing with the question of court-fee. The proper basis is that the plaintiff asks for possession from the alienee but the alienee may in certain circumstances have an equitable right to ask the Court so as to work out the partition as to leave him if possible in possession of the alienated properties.

In this view I cannot accede to Mr. Venkatarama Aiyar's contention that cl. 5 ought not to be applied to any part of the plaintiff's claim. The trial Court will with all convenient speed

assess the court-fee payable on the plaint on the above basis. Costs of the second appeal and of the appeal to the lower appellate Court will abide the result of the suit in the trial Court. The court-fee paid on the memorandum of appeal to the lower appellate Court and on the memorandum of second appeal here will be refunded.

Karaia Nachi Bivi *v.* Allapichai.

K. C. —— *Order made.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATARAMANA RAO.

Venkatachariar .. *Appellant** (*Plaintiff*)

v.

South Indian Bank and another .. *Respondents* (*Defendants 1 and 2*).

Venkatachariar *v.* South Indian Bank.

Res judicata—*Father's suit against son's creditor and son—Father disputing the attachment by creditors of son of suit property on the ground of the property being his self-acquisition—Previous suit by father against son and others for declaration of suit property as his self-acquisition—Judgment in favour of father—Father seeking to raise a plea in the present suit of* res judicata—*Son's creditor not a party to the earlier suit by the father—Creditor claiming under rights of the son*—Res judicata *even though creditor of son was no party to the previous suit.*

The plaintiff was the father of second defendant, and the first defendant, a creditor of the second defendant, in execution of a decree against the second defendant, attached the suit property. The plaintiff filed the present suit for a declaration that the suit property was self-acquired property, that the second defendant had no right therein, that the first defendant was not entitled to attach the same as the property of the second defendant, and for an injunction restraining him from bringing the said property to sale. Before the said attachment by the first defendant, the plaintiff had instituted also a suit against the second defendant and others for a declaration that the properties described in the plaint thereto were his self-acquired properties and that second defendant had no manner of claim thereto. In that suit he obtained a decree and it was alleged the present suit property had been included in the schedule to the previous suit decreed in his favour. Before the present suit was taken up the plaintiff (father) sought to amend the plaint and raise an issue by reason of the judgment in the previous suit that the first defendant should be precluded from contesting his claim by operation of the rule of *res judicata.* The first defendant was not a party to the previous suit in which the plaintiff got a decree in his favour.

Held, that since so far as the previous suit was concerned the second defendant did represent all interests in the property in the litigation and so far as the present suit was concerned the first defendant should be deemed to claim under the second defendant litigating under the same title (*vide* A.I.R. 1934 Rang. 206), the decision in the previous suit defeating second defendant's claim should be held to bar the assertion of the second defendant's title

* S. A. No. 878 of 1931. 24th November, 1936.

Venkatachariar *v.* South Indian Bank.

by the first defendant in the present suit, provided the suit property had, as alleged, formed part of the schedule to the plaint in the former suit.

The rule of law applicable in cases of *jus tertii* may well be applied here, *viz.*, 'whatever would estop or bar the person whose title is set up must also bar the person pleading *jus tertii* whether the estoppel is by record, deed or *in pais*.'

Najimunnessa Bibi v. *Nacharuddin Sardar*, (1923) I.L.R. 51 Cal. 548 at 555, relied on.

Secretary of State for India v. *Syed Ahmad Badsha*, (1920) 41 M.L.J. 223: I.L.R. 44 Mad. 778 at 801 (F.B.), referred to.

The lower Court ought to have raised the issue of *res judicata.*

Appeal against the decree of the Court of the Subordinate Judge of Tinnevelly in A.S. No. 112 of 1926 (A.S. No. 144 of 1925, District Court) preferred against the decree of the Court of the District Munsiff of Tinnevelly in O.S. No. 12 of 1923.

C. S. Venkatachariar and *D. Ramaswami Aiyangar* for Appellant.

S. Muthiah Mudaliar for Respondents.

The Court delivered the following

JUDGMENT.—The main question in this second appeal is whether the lower Court ought to have raised an issue whether the defendant is precluded from impeaching the title of the plaintiff to the suit property by reason of the decision in O. S. No. 24 of 1921 on the file of the Sub-Court of Tinnevelly. The facts necessary for its disposal may be shortly stated. The plaintiff is the father and the second defendant is his son. The first defendant is a creditor of the second defendant. In execution of a decree obtained against the latter in O. S. No. 640 of 1920 on the file of the District Munsiff's Court of Tenkasi he attached the suit property on 12th April, 1922. The plaintiff filed the present suit, O. S. No. 12 of 1923 for a declaration that the suit property is his self-acquired property, that the second defendant has no right therein, that the first defendant is not entitled to attach the same as the property of the second defendant and for an injunction restraining him from bringing the said property to sale. Before the attachment by the first defendant the plaintiff had instituted a suit O. S. No. 24 of 1921 on the file of the Sub-Court, Tinnevelly, against the second defendant and others for a declaration that the property described in the plaint thereto is his self-acquisition, that the second defendant has no manner of right thereto and that the several alienations made by him of some of the

properties in the said suit are not binding on him. On the 20th March, 1923, the plaintiff obtained a decree in his favour in the said O. S. No. 24 of 1921. It is alleged that the suit property formed the subject-matter of the said suit and decision thereon. Before the present suit was taken up for trial, the plaintiff sought to amend the plaint and raise an issue that by reason of the judgment in the said suit, the first defendant is precluded from contesting his claim by the operation of the rule of *res judicata.* The judgment was marked as Ex. F in the case but the learned District Munsiff refused to raise an issue on the ground that the first defendant was not a party thereto. On appeal, though Ex. F was relied upon at the hearing the questions relating to *res judicata* and the correctness of the order of the District Munsiff were not raised but after the hearing was closed an application was put in to raise the same and when the application was taken up the appellant's vakil absented himself and the application was dismissed. The learned Subordinate Judge refused to act on Ex. F on the ground that is inadmissible because the first defendant was not a party to it. On behalf of the appellant Mr. Ramaswami Aiyangar urges that the lower Courts should have raised the issue, but it is contended in answer that having regard to the conduct of the plaintiff he should not be permitted to raise the question in second appeal, that Ex. F did not relate to the suit property and that it was the result of collusion between father and son.

Before considering the question whether the plaintiff should be given an opportunity to raise this issue, it is necessary to decide whether assuming the facts were as alleged by the plaintiff and the judgment in the prior suit was honestly obtained, it would be *res judicata* between the plaintiff and the first defendant. There is no doubt that the issue in both the suits is identical, namely, whether the suit properties are the self-acquisition of the plaintiff and the second defendant has any interest therein. There can also be no doubt that the decision in the prior suit is *res judicata* between the plaintiff and the second defendant. The question therefore is, what is the position of the first defendant? Does he claim through the second defendant or to put the matter in another way, did the second defendant in the former suit represent the interest of the first defendant? If so, he is barred, otherwise not. By virtue of the attachment there is no transfer of the interest of

Venkatachariar *v.* South Indian Bank.

the second defendant to the first defendant and the ownership in the property continued in the second defendant. The effect of the attachment is thus stated by Rankin, C.J., in *Najimunnessa Bibi* v. *Nacharuddin Sardar*[1]:

> "Until attachment a judgment-creditor cannot litigate *in his debtor's place* (the italics are mine) to assert his debtor's rights; while the attachment lasts, no new interest can be created to defeat it; and, although in this country, owing partly to the rule as to rateable distribution, attachment does not amount to a specific charge in favour of the decree-holder or by itself give him, in strictness a title thereto it is nevertheless the basis of all the judgment-creditor's right to assert his debtor's interest in the particular property in question".

Therefore so far as O. S. No. 24 of 1921 is concerned, the second defendant did represent all interests in the property in the litigation and so far as the present suit is concerned the first defendant must be deemed to claim under the second defendant litigating under the same title, vide *U Tha Lu* v. *Devanarain*[2]. The first defendant himself has no right or title to the property. He has to rely on the title of the second defendant and stand or fall with him. In *Moti Lal* v. *Karrab-ul-din*[3] the Privy Council held that an attachment by a judgment-creditor of a property alleged to be the judgment-debtor's is of no avail when there has been a subsequent adjudication in a suit between a third party and the judgment-debtor negativing the latter's right and a transfer in pursuance of the attachment subsequent to the adjudication is inoperative as against the party in whose favour the adjudication has been made. The reason of the rule is that what the judgment-creditor can attach and sell is only the right, title and interest of the judgment-debtor and if it is found he has none, the attachment operates on nothing and the execution sale confers nothing. (Vide also *Parvati* v. *Kisansing*[4]). In my opinion the rule of law applicable in cases of *jus tertii* may well be applied here, *viz.*, "whatever would estop or bar the person whose title is set up must also bar the person pleading *jus tertii* whether the estoppel is by record, deed or *in pais*". (Vide *Secretary of State for India* v. *Syed Ahmad Badsha*[5].) Thus if the second defendant is barred, the first defendant who

---

1. (1923) I.L.R. 51 Cal. 548 at 555.
2. A.I.R. 1934 Rang. 206.
3. (1897) L.R. 24 I.A. 170: I.L.R. 25 Cal. 179 (P.C.).
4. (1882) I.L.R. 6 Bom. 567 at 569, 570.
5. (1920) 41 M.L.J. 223: I.L.R. 44 Mad. 778 at 801 (F.B.).

Venkatachariar v. South Indian Bank.

is setting up his title is equally barred, I am therefore of opinion that the first defendant would be precluded from asserting the title of the second defendant by reason of the decision in O. S. No. 24 of 1921 on the file of the sub-Court, Tinnevelly. I think the lower Court ought to have raised the issue. In view of the contentions raised by Mr. Muthiah Mudaliar, before finally deciding this second appeal it is necessary to raise the following issues and have findings on them:—

(1) Whether the prior suit (O. S. No. 24 of 1921) on the file of the Sub-Court, Tinnevelly) related to the suit property and there was an adjudication regarding thereto.

(2) Whether the judgment in that suit was the result of collusion between the plaintiff and the present second defendant.

I therefore direct the lower appellate Court to submit the findings on the said issues within two months from the date of the receipt of this order after taking evidence adduced by both parties who are given leave to tender the necessary evidence. Time for objections, 10 days. Having regard to the conduct of the plaintiff I direct the plaintiff to pay the costs of the first defendant incurred up to date including the hearing of the second appeal, *viz.*, cost incurred in the District Munsiff's Court, costs incurred before the Sub-Judge after remand by the High Court and the costs of hearing of this appeal. Costs of further enquiry in the lower Court and further hearing in this second appeal will abide the result.

FINDING.

* * * * * *

The Court delivered the following

JUDGMENT.—I accept the finding that the judgment in the prior suit O.S. No. 24 of 1921 was not obtained by fraud or collusion by the present second defendant. I therefore reverse the decree of the learned Subordinate Judge and restore the decree of the District Munsiff. I direct the respondent to pay the appellant rupees eighty-five (Rs. 85) for his costs of this appeal.

Leave to appeal is granted.

K.C. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATASUBBA RAO AND MR. JUSTICE CORNISH.

Pulavarti Lakshmanaswami .. *Appellant** (*Plaintiff*)

v.

Mahammad Galah Hussain Saheb Garu and others .. *Respondents* (*Defendants*).

Lakshmanaswami v. Mahammad Galah Hussain Saheb.

Madras District Police Act (XXIV of 1859), S. 53—"Anything done or intended to be done under the provisions of the Act"—Malicious act of police officer—Suit by injured party for damages—Special period of limitation if applicable.

Where a Police Officer acts maliciously, such as by bringing a false charge against a man, his act ceases to be an act "done or intended to be done under the provisions of the Act" within the meaning of S. 53 of the Madras District Police Act of 1859 and in such a case an action for damages brought against the Police Officer by the injured party will not be governed by the special period of limitation prescribed by S. 53.

Theobald v. *Crichmore*, (1818) 1 B. & Ald. 227=106 E.R. 83; *Smith* v. *Shaw*, (1829) 10 B. & C. 277: 109 E.R. 453; *Kirby* v. *Simpson*, (1854) 10 Ex. 358: 156 E.R. 482; *Newell* v. *Starkie*, (1919) 2 Ir. Rep. 325 and *Scammell and Nephew, Ltd.* v. *Hurley*, (1929) 1 K.B. 419, referred to.

Appeal against the decree of the Court of the Subordinate Judge of Ellore in O. S. No. 2 of 1929.

V. Viyyanna for Appellant.

The Government Pleader (*K. S. Krishnaswamy Aiyangar*) for Respondents.

The Court delivered the following

Venkatasubba Rao, J.

JUDGMENTS. *Venkatasubba Rao, J.*—This appeal raises an important question, namely, whether in an action for a malicious act against a police officer, he is entitled to raise the defence of limitation, relying upon the protection given by S. 53 of the Madras District Police Act (XXIV of 1859). The plaintiff alleges that the first defendant, a Police Sub-Inspector, accusing him falsely of having obstructed a public pathway by heaping bricks, commenced with a malicious motive a prosecution against him (C. C. No. 318 of 1927) on 18th March, 1927, under Ss. 188 and 283, Indian Penal Code, and that two days later (on the 20th March) he maliciously instituted another false complaint (C. C. No. 320 of 1927) under S. 291, Indian Penal Code, in connection with the same alleged heaping of bricks. The plaintiff further alleges that although the earlier

* Appeal Suit No. 256 of 1931. 10th November, 1936.

Lakshmanaswami v. Mahammad Galah Hussain Saheb.

Venkatasubba Rao, J.

complaint was enquired into and dismissed, the second charge, instead of being withdrawn, was pressed and continued, which also was ultimately found to be false. The third defendant is a Circle Inspector, who, it is alleged, came on transfer to the village in question. It was his duty, the plaintiff states, to have withdrawn the second complaint but from improper motives he failed to do so. The second defendant is the Secretary of State for India, against whom also damages have been claimed on the ground that he is liable for the tortious acts of his agents.

The suit has been dismissed by the Court below and the plaintiff has preferred the present appeal. So far as the Secretary of State is concerned, the appeal has not been pressed; it fails and is accordingly dismissed with costs.

The order of acquittal in respect of the first complaint was made on 26th July, 1927, in respect of the second, on the 21st November of the same year, and the suit was filed on 3rd January, 1929. Under the Limitation Act in regard to actions for malicious prosecution, time runs from the date when the plaintiff is acquitted or the prosecution is otherwise terminated and the period prescribed is one year (Art. 23). In this case the plaintiff gave a notice under S. 80 of the Civil Procedure Code, and according to the lower Court, should the case be held to be governed by the Limitation Act, in computing limitation the period of the notice should be excluded, and the learned Government Pleader concedes that this conclusion is right. But even upon this footing the suit, having been brought more than fourteen months from the date of the first acquittal, is out of time, in so far as it relates to the earlier complaint. The appeal to that extent again has not been pressed.

Thus, the action is confined to the second prosecution and is pressed only as against defendants 1 and 3. S. 21 of the Madras District Police Act provides *inter alia* that it shall be the duty of every police officer to use his best endeavours and ability to prevent all crimes, offences and public nuisances; to preserve the peace and to apprehend disorderly and suspicious characters; to detect and bring the offenders to justice. Then the next relevant provision (S. 53) in so far as it applies to the facts of the case, runs as follows:—

"All actions and prosecutions against any person, which may be lawfully brought for anything done or intended to be done, under the provisions of

Lakshmanaswami *v.* Mahammad Galah Hussain Saheb.

Venkatasubba Rao, J.

this Act, or under the general police powers hereby given, shall be commenced within three months after the act complained of shall have been committed, and not otherwise".

The question is, whether the protection given by this section extends to acts done by a police officer out of malice. The learned Government Pleader contends that there is nothing to suggest that such acts are excluded and that the words should receive their plain and natural meaning; it should be wrong, he maintains, to construe the section as if the word *'bona fide'* occurred before the words 'done or intended to be done'. But the question is, whether upon a true construction of the section, a person who acts maliciously can be said to act under the provisions of the statute or the general powers conferred by it. There were numerous statutes in force in England, passed from time to time, with a view to afford protection to public authorities. The enactment under consideration is one of 1859 and both before that date and since then, provisions similar to the one in question were and have been considered. In *Theobald* v. *Crichmore*[1] the question arose under the twelfth section of the statute 53 Geo. III, c. 127, by which it was enacted:

"That if any action shall be brought for anything done in pursuance of this Act, every such action shall be commenced within three calendar months after the act committed and not afterwards".

Lord Ellenborough, C.J., rejected the contention that the statute extended only to acts lawfully done; for, to say that where the law is exceeded, the officer loses the benefit of the statute, would be to render the protection illusory, for it is then that he requires its protection. But illegal acts protected under the statute, the Chief Justice went on to observe, are those done through ignorance or inadvertence. Bayley, J., concurred with this view and said:

"It appears to me that the officer acted illegally but in the supposed *bona fide* execution of his duty, and he is therefore entitled to the protection of this statute".

Parton v. *Williams*[2] arose under the eighth section of 24 Geo. II, c. 44, which enacted:

"That no action shall be brought against any justice of the peace for anything done in the execution of his office, or against any Constable, Headborough or other officer or person, acting as aforesaid unless within six calendar months after the act committed".

---

1. (1818) 1 B. & Ald. 227: 106 E.R. 83.
2. (1820) 3 B. & Ald. 330: 106 E.R. 684.

The Constable there, under a warrant commanding to take the goods of *A*, took the goods of *B*, believing them to belong to *A*. Abbot, C.J., held that the provision was intended for the benefit of persons who intend to act right but by mistake act wrong. In the judgments of Bayley, J. and Best, J., there are observations to the same effect. In that case it being held that the Constable acted *bona fide* the action brought beyond the period of six months was dismissed.

In *Smith* v. *Shaw*[1] the question arose with reference to the Commercial Dock Act (50 Geo. III, c. 207). It was provided by S. 94 of that Act:

"That if any action shall be brought against any person for anything done in pursuance of this Act, such action shall be commenced within six calendar months next after the act committed or in case there be a continuation of damage, within two months after the doing or committing of such damage shall have ceased".

Bayley, J., delivering the judgment of the Court, observes that according to the decisions which have construed similar words, so long as the person concerned acts *bona fide*, although he acts erroneously, he is to be considered as acting in pursuance of the Act and is to be entitled to its protection.

The learned Government Pleader relies upon *Kirby* v. *Simpson*[2] which arose under 11 and 12 Victoria, Ch. 44, also a statute passed before the Police Act with which we are concerned. There, the question arose whether a Magistrate, acting *mala fide* in the execution of his office, is entitled to notice of action under ninth section of that statute and the answer was in the affirmative. That case, however, turned upon the express words of that section which, so far as it is relevant to the present case, may be read thus:

"Whereas it is expedient to protect justices of the peace in the execution of their duty; be it therefore enacted . . . . . . that every action hereafter to be brought against any justice of the peace for any act done by him in the execution of his duty as such justice . . . . . shall be an action on the case as for a tort; and in the declaration it shall be expressly alleged that such act was done maliciously and without reasonable and probable cause".

Then S. 8 provides that no action shall be brought beyond six months after the act complained of and S. 9 enacts that at least one calendar month's notice shall be given of such intended action. It will be seen that actions for malicious acts are among those contemplated by the statute itself, and, as has

1. (1829) 10 B. & C. 277: 109 E.R. 453.
2. (1854) 10 Ex. 358: 156 E.R. 482.

Lakshmana-swami v. Mahammad Galah Hussain Saheb.

Venkata-subba Rao, J.

been pointed out by Parke B.:

> "The first section of the 11 and 12 Vic., Ch. 44 assumes that a person may act maliciously and without reasonable and probable cause and nevertheless be acting in the execution of his duty as a justice of the peace".

Parke B. guardedly adds (and that is important) that his observations apply only to the statute then under consideration and not to those cases which may arise under various Acts of Parliament affording protection to persons acting *bona fide.*

These various statutes to which I have referred, were special statutes passed prior to the Police Act now under consideration. But in 1893 a general Act was passed in England known as the Public Authorities Protection Act, S. 1 of which so far as it is material, runs as follows:—

> "Where after the commencement of this Act. . . . any action is commenced . . . . against any person for anything done in pursuance . . . . of any public duty, the following provision shall have effect".

and then it is provided that an action should not lie, if not commenced, within six months. Dealing with that section, Lord Finlay in *Newell* v. *Starkie*[1] declares that the Act will not apply if it is established that the defendant had abused his position for the purpose of acting maliciously.

> "In that case he has not been acting within the terms of the statutory or other legal authority; he has not been *bona fide* endeavouring to carry it out."

To the same effect is the observation of Lord Atkinson, who also draws a distinction between an act done maliciously and one done mistakenly but honestly; in the former case the officer is not protected, whereas in the latter he is. This very authoritative statement of the law has been adopted by the Court of Appeal in *Scammell and Nephew, Ltd.* v. *Hurley*[2]. Scrutton, L.J., points out that illegal acts are protected by statute, but the protection disappears if they are done with an improper motive such as spite; in that case the Acts complained of are not done in intended execution of a statute, but only in pretended execution thereof. The learned Lord Justice quotes with approval Blackburn, J., who observes in *Selmes* v. *Judge*[3]:

> ". . . . . The judge thought that the defendants were not acting under the 5 and 6 William IV, c. 50 and that consequently they were not entitled to the notice of action allowed thereby. I agree that if a person knows that he has not under a statute authority to do a certain thing, and yet intentionally does that thing, he cannot shelter himself by pretending that the thing was done with intent to carry out that statute."

---

1. (1919) 2 Ir. Rep. 325.
2. (1929) 1 K.B. 419.
3. (1871) 6 Q.B. 724.

Lakshmanaswami v. Mahammad Galah Hussain Saheb.

Venkatasubba Rao, J.

The observations of Blackburn, J., are quoted with approval also by Greer, L.J. and Sankey, L.J.

It is difficult to say upon what particular English Statute S. 53 of the Police Act has been modelled, but in substance there is no difference between that section and the provisions which have been judicially considered in the decisions already referred to. Both S. 52 and those statutes have the same object in view, that of affording protection to public officers in the discharge of public duties; and if S. 53 is compared with the English Act of 1893, it will be seen that in regard to the nature of the protection afforded, similar safeguards have been prescribed. The first under the section in question relates to time—three months' limitation; the English Act provides a period of six months. The second under both S. 53 and the English Act, relates to the right given to the defendant to make a tender and thirdly, both the enactments contain special rules as to costs. We shall not be justified therefore in departing from the construction uniformly adopted in English decisions.

There is one further argument that remains to be noticed. The learned Government Pleader relies on S. 44 of the Police Act which, while prescribing penalties for certain illegal Acts and omissions, refers to police officers maliciously preferring false complaints, but I fail to see how it is of any avail to him; for, the Police Act says nowhere that the protection given by S. 53 refers to all sorts of acts or omissions alluded to in the Act. If an act is done maliciously, upon the construction uniformly adopted, it ceases to be an act, "done or intended to be done under the provisions of this Act", and that construction is not in the least affected by there being a reference, in some section of the enactment, to malicious acts. The moment an act is shown to be malicious, it ceases to be protected by S. 53 and unless a contrary intention can be gathered, as from the language of 11 and 12 Vic., Ch. 44, S. 1 considered in *Kirby* v. *Simpson*[1] already referred to, there can be no justification for holding that the legislature intended to extend the protection to acts actuated by malice.

Then, as to *Koti Reddi* v. *Subbiah*[2] it dealt with the construction of S. 80 of the Civil Procedure Code and the decision turned upon the words "purporting to be done" occurring there. That case has therefore no bearing on the point raised.

1. (1854) 10 Ex. 358: 156 E.R. 482.
2. (1918) 34 M.L.J. 494: I.L.R. 41 Mad. 792 (F.B.).

Lakshmanaswami *v.* Mahammad Galah Hussain Saheb.

Venkatasubba Rao, J.

In an action for malicious prosecution, malice being requisite, S. 53 can have no application. In regard to the English Act of 1893, it has been held that actions for deceit or malicious prosecution may be commenced after the expiration of the six months' limit, as there can be no *bona fides* in the commission of a fraudulent or malicious act (23 Hals., S. 696).

In the result, so far as defendants 1 and 3 are concerned, the lower Court's decree is set aside, the appeal is allowed and the case is remanded for being disposed of on the merits; as regards the costs of the appeal, the plaintiff will get them if he succeeds in this suit, and the lower Court will in that event provide in its decree for payment of these costs to the plaintiff.

Cornish, J.

Cornish, J.—I am of the same opinion. I am unable to agree with the proposition that anything done by a Police Officer in his capacity of a Policeman is something done under the Police Act, or under his general Police powers given by the Act, notwithstanding that it was done maliciously. S. 21 of the Act says that a Police Officer shall for all purposes in the Act contained be considered to be always on duty. But I think it would be going too far to hold that this would cover any act done by a Police man under colour of his office. The duty which is cast upon the officer by the section is to "use his best endeavours and ability" to prevent all crimes, offences and public nuisances; to preserve the peace; and to detect and bring offenders to justice, and so forth. He may, of course, make a mistake. He might arrest or charge an innocent person. But in making an honest mistake the Officer might still have been using his best endeavours to carry out his duties. In such case he will not have an immunity from legal proceedings for what he has done; though any legal proceedings against the Officer by the aggrieved party must be taken within the three months' time-limit fixed by S. 53. But it can be no part of an Officer's duty to wilfully bring a false charge against a man. On this ground alone I think that an officer who so abuses his powers could not claim to have done what he did under the Police Act or under his general Police powers. The question is put beyond doubt by the decisions of the House of Lords in *Newell* v. *Starkie*[1] that a public Officer acting in the exercise of a statutory or other authority will not have the protection of the Public Authorities Protection Act, 1893, if he has acted

1. (1919) 2 I.R. 325.

Lakshmanaswami v. Mahammad Galah Hussain Saheb.

Cornish, J.

maliciously. There is no substantial difference between the purposes of the English and the Madras Acts. The English Act provides that an action or prosecution shall not lie against any person for any act done in pursuance of an act of Parliament or of any public duty or authority unless it is commenced within six months after the Act complained of. S. 53 of the Madras Police Act says that all actions and prosecutions against any person for anything done under the provisions of the Act, or under the general Police powers given by the Act, shall be commenced within three months after the Act complained of. The English Act applies to all public officers, inclusive of Police officers, exercising statutory authority; whereas the Madras Act is limited to Police officers exercising Police authority under the Act. There is, therefore, no reason in point of policy or construction for excluding from the Madras Act the principle which is applicable to the English Act. I think, then, upon this principle, that an act done by a Police officer in the exercise of his Police powers will not have the benefit of S. 53 of the Act, if it was done maliciously. But the onus is on the plaintiff in the suit to prove by strong and cogent evidence the existence of malice and the absence of any honest desire to execute his powers on the part of the Police officer; *Scammell & Nephew, Ltd.* v. *Hurley*[1]. If the plaintiff, the present appellant, is unable to discharge this burden, his suit will come within S. 53 and will be hopelessly time barred.

B.V.V. ——— *Case remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VARADACHARIAR AND MR. JUSTICE MOCKETT.

K. M. Ramakrishna Mudaliar .. *Appellant** (*Plaintiff*)

v.

V. S. V. Manikka Mudaliar (deceased) and others .. *Respondents* (*Defendants*).

Ramakrishna Mudaliar v. Manikka Mudaliar.

Hindu Law—Trading family—Junior member in charge of one of the shops belonging to the family—Mortgage for necessary purpose by the member in charge of business—Proof of joint family nature of the business and transactions—Whether such a member could bind the other members with his own debts.

The defendant who was undoubtedly a member of a joint family which consisted of a large number of male members and while his father was also alive, mortgaged properties which from several statements on record stood in the defendants' name. The evidence proved that the family was a trading

1. (1929) 1 K.B. 419.

* Appeal No. 148 of 1931. 25th September, 1936.

Rama-krishna Mudaliar *v.* Manikka Mudaliar.

family and was carrying on cloth trade, and for convenience, they were having two shops. The plaintiff was clearly proved to have been supplying goods to and to have had dealings with the shops of the defendants' family. Some of the other contesting defendants were purchasers of properties from the other members of the family. In an insolvency proceeding of the fourth defendant, another member of the family, he included the suit debt as one of the debts for which he would be liable and the Official Receiver also while selling the family properties sold them subject to the mortgages including the suit mortgage. On the following questions arising (1) whether the first defendant in entering into the mortgage transaction purported to mortgage the properties standing in his name, describing them as properties purchased out of his own earnings and in his possession and enjoyment; (2) whether in view of the principle of decision in *Balwant Singh* v. *R. Clancy*, (1912) 23 M.L.J. 18: L.R. 39 I.A. 109: I.L.R. 34 All. 296 (P.C.), the Court would not be justified in treating the suit mortgage as a transaction entered into by the first defendant on behalf of the family and its manager; and (3) whether the first defendant as a junior member of a family could by contracting the mortgage debt bind the interests of the other members in the family property.

Held, (1) that from the established evidence the properties were impressed with joint family nature.

(2) That decisions of the Madras High Court like *Sabapathy Chetty* v. *Ponnuswami Chetty*, (1915) 28 I.C. 365 and *Sadayappa Asari* v. *Raghava Asari*, (1919) 62 I. C. 220, would answer the question raised in *Balwant Singh* v. *R. Clancy*, (1912) 23 M.L.J. 18: L.R. 39 I.A. 109: I.L.R. 34 All. 296 (P.C.), to the effect that the mere fact that properties are described by a member of a family as properties acquired out of his earnings is not the assertion of such a hostile claim as against the interests of the family or an indication that it was his own personal transaction as to preclude the application of the principle that if the purpose was one binding on the family the transferor might still be regarded as having entered into the transaction in the capacity in which he could bind the family.

(3) That since the plaint proceeded on the footing that the first defendant was the 'accredited agent' of the family within the meaning of the rule enunciated by Maine and adopted by many decisions later on that a person who is an 'accredited agent' of a family so as to be able to bind the family by debts borrowed for a proper and necessary purpose can also pledge the properties of the family for debts so incurred, the suit debt was binding on the family.

Sheo Pershad Singh v. *Saheb Lal*, (1892) I.L.R. 20 Cal. 453, relied on.

Appeal against the decree of the Court of the Subordinate Judge of Chingleput in O. S. No. 63 of 1927.

B. Sitarama Rao and *V. M. Ramaswami Mudaliar* for Appellant.

K. S. Krishnaswami Aiyangar, N. S. Rangaswami Aiyangar and *V. Raghavachariar* for Respondents.

The judgment of the Court was delivered by

Varada-chariar, J.

Varadachariar, J.—This appeal arises out of a mortgagee's suit for sale. The mortgage document (Ex. A) which was executed by the first defendant on 25th September, 1915, comprised properties which it appears from several statements on

record stood in the first defendant's name, but as the title deeds themselves have not been produced it is not possible to make a mere positive statement on the point. At the time of the mortgage, the first defendant was undoubtedly a member of a joint family which consisted of a large number of male members and his father Varadaraja Mudaliar was also alive. The evidence establishes that the family was a trading family and was carrying on cloth trade; for convenience, they were having two shops which may be referred to as Shop No. 154 and Shop No. 172. In their dealings with outsiders, the family seem to have found it convenient, whether it be for book-keeping purposes or for other purposes as well, to keep two sets of accounts, one for Shop No. 154 and another for Shop No. 172 though there was some amount of mixture even in respect of the transactions relating to one shop and the other. The plaintiff is clearly proved to have been supplying goods to and to have had dealings with both these shops for a long period. It is also stated that he was related to the family and presumably he was well acquainted with its position and affairs.

The main contesting defendants are persons who have purchased the interest of the second and third defendants in certain items of property in Court-sale and in the interests of the fourth defendant in a sale by the Official Receiver in the insolvency of the fourth defendant. These purchases took place in the years 1926, 1927 and 1929, and the insolvency proceedings began in 1923. It is clear that between 1915 and the date of the suit no member of the family ever questioned either the binding character of this debt or the binding character of the mortgage; on the other hand, we have the fact that in a partition suit instituted by the third defendant against the other members of the family in 1916 the properties comprised by the suit mortgage were not brought into the partition suit at all by any of the parties thereto nor was any suggestion made that this mortgage was not binding on the family. In the insolvency petition filed by the fourth defendant, he included the suit debt as one of the debts for which he was liable, and referred to the existence of the mortgage securing repayment of the same. Neither the Official Receiver nor any of the creditors of the fourth defendant took any steps to impeach the suit mortgage. On the other hand, the Official Receiver sold the property subject to the suit mortgage

Ramakrishna Mudaliar v. Manikka Mudaliar.
——
Varadachariar, J.

and when certain of the creditors attempted to have that sale set aside as having been held at an undervalue the Official Receiver as well as the present 13th and 14th defendants justified the sale on the ground—that as the properties were sold subject to mortgages including the suit mortgage the price fetched at the sale was a fair value. It is true that the mere fact of the sale having been held subject to the mortgage would not preclude purchasers from questioning the truth or the validity of the mortgage. *Izzat-un-nisa Begum* v. *Pertab Singh*[1]. But the conduct of the parties can certainly be taken into account in dealing with the question of fact and drawing inference as to the truth and validity of the mortgage.

A suggestion was made in the written statements of the alienee-defendants in this case, that the suit mortgage was a sham transaction not supported by consideration but brought into existence in favour of a near relative of the family merely for the purpose of screening some property from the creditors of the family. In the argument before us, reliance was placed in this connection upon the admission of P.W. 1 that the title deed was not examined before the mortgage was taken nor did the plaintiff make any adequate enquiries. It was also pointed out that the suit had been instituted after considerable delay almost when the period of limitation was about to expire. These circumstances are explained, by the very relationship that the parties bore to each other. If the plaintiff was related to the family of the mortgagor defendants and had known their affairs there was nothing particular for him to enquire about. Similarly when nobody ever disputed his mortgage but on the other hand it was not called in question either in the partition suit or in the insolvency proceedings, it is nothing strange that in view of his relationship to the family the plaintiff did not think it necessary to sue unless and until it became inevitable. The real question therefore is whether there is sufficient proof on record as to the existence of the debt the payment of which was secured by this mortgage. The learned Subordinate Judge has discussed the evidence on this point very fully; a large mass of correspondence has been filed showing the dealings between the parties; the plaintiff also filed his accounts in Court showing how the amount of the suit bond was arrived at. No

1. (1909) 19 M.L.J. 682: L.R. 36 I.A. 203: I.L.R. 31 All. 583 (P.C.).

Rama-krishna Mudaliar *v.* Manikka Mudaliar.

Varada-chariar, J.

attempt has been made by the contesting defendants to show that the evidence thus *prima facie* furnished is open to suspicion.

It has been pressed upon us that the plaintiff did not call any of the members of the mortgagor's family to give evidence on his side. Assuming for the sake of argument that all the members of the mortgagor's family are sympathising with the plaintiff, there is nothing whatever to show that the Official Receiver if he had been summoned on the defendant's side would not have produced the accounts of the business or would not have given useful information bearing on the question of the truth of the debt and he would have been in the best position to explain why neither he nor any of the other creditors in the insolvency of the fourth defendant thought fit to impeach the suit mortgage but on the other hand to sell the properties subject to the suit mortgage. In these circumstances we have no hesitation in concurring in the finding of the lower Court that Ex. A was executed for the balance due on settlement of accounts of dealings between the plaintiff and the first defendant in respect of the business carried on by the first defendant in Shop No. 172.

The only other question in the case was whether the suit mortgage was binding upon the interests of the other members of the family in the mortgaged properties. On a view of the law which seems to us untenable, the learned Subordinate Judge held against the plaintiff on this point. On behalf of the respondents his view has been attempted to be supported on three grounds. The first of them is that in entering into the suit mortgage transaction, the first defendant did not purport to act on behalf of the family or as manager of the family business but only purported to mortgage the properties standing in his name describing them as properties purchased out of his earnings and in his possession and enjoyment. It was pointed out that the plaint did not proceed on the footing that these properties were the self-acquired properties of the first defendant and as such the first defendant was entitled to mortgage them in his own right. It was next argued that in view of the principle of the decision in *Balwant Singh* v. *R. Clancy*[1] the Court will not be justified in treating the suit mortgage as a transaction entered into by the first defendant on behalf of the family and as its manager. Lastly, it was contended that as

1. (1912) 23 M.L.J. 18: L.R. 39 I.A. 109: I.L.R. 34 All. 296 (P.C.).

Ramakrishna Mudaliar *v.* Manikka Mudaliar.

Varadachariar, J.

the first defendant was only a junior member of the family he had no authority to mortgage the interests of the other members in the family property.

As to the first of these questions, it must be admitted that though in paragraph 3 of the plaint there is a reference to some of the mortgaged items standing in the name of the first defendant, the plaint proceed mainly on the footing that the mortgage was made for purposes of the joint family business and is therefore binding upon whatever interest the other members of the family possessed in the mortgaged items. The lower Court's decision that the mortgaged properties must be held to be properties of the joint family apparently rests upon the presumption of the Hindu Law in favour of their joint character and the general rule as to onus of proof in regard to self-acquisition when purchases are made in the name of a member of a joint family. By way of excluding that presumption in this case, Mr. Sitarama Rao invited our attention to the observations of this Court in *Kumarappa Chettiar* v. *Adaikkalam Chetty*[1] following a judgment of the Bombay High Court in *Narayan Babaji* v. *Nana Manohar*[2]. If the matter rested upon presumptions alone Mr. Sitarama Rao is probably justified in the contention that the presumption arising in favour of the joint character at the time of the mortgage may well be set against the presumption arising from the non-inclusion of these properties in the partition suit of 1916 and the presumption of the completeness of a partition when one takes place, so that at the time when the question arises in this suit there is no scope for the application of any presumption in favour of the joint family character of the properties. But, as pointed out by Mr. Krishnaswamy Aiyangar on behalf of the respondents, the matter does not rest upon presumption alone, because the very facts spoken to by P.W. 1 in the evidence go to establish the joint family character of these properties. We do not therefore think it proper or necessary to rest our decision in this case on any finding that the mortgaged properties were the separate properties of the first defendant.

The second head of argument advanced by the learned Counsel for the respondents on the strength of the decision in *Balwant Singh* v. *R. Clancy*[3] is answered by more than one

1. (1931) 62 M.L.J. 141 : I.L.R. 55 Mad. 483 at 491.
2. (1870) 7 B.H.C.R. 153 at 176.
3. (1912) 23 M.L.J. 18 : L.R. 39 I.A. 109 : I.L.R. 34 All. 296 (P.C.).

decision of this Court (vide *Sabapathy Chetty* v. *Ponnuswamy Chetty*[1] and *Sadayappa Asari* v. *Raghava Asari*[2]) to the effect that the mere fact that properties are described by a member of a family as properties acquired out of his earnings is not the assertion of such a hostile claim as against the interests of the family or an indication that it was his own personal transaction as to preclude the application of the principle that if the purpose was one binding on the family the transferor might still be regarded as having entered into the transaction in the capacity in which he could bind the family. It must also be remembered that in this case, cloth Shop No. 172 was undoubtedly a concern of the joint family and there is no reason why the first defendant should mortgage what he considered his self-acquired properties for the liabilities of that shop. As has frequently been pointed out in the judgments of this Court, the mere description that properties were acquired out of a member's earnings is not the same as claiming for it the character of 'self-acquisition' in the legal sense; it is merely a statement of the fact that they were not originally the property of the joint Hindu family but had been acquired out of the earnings made in the course of business by one of the members. The fact that the law will in such circumstances impress upon the property so purchased the character of joint family property should not be unduly pressed in construing the terms of the document.

With reference to the third question, namely, the power of the first defendant to bind the interests of the other members of the family by the suit mortgage, the evidence establishes what indeed is admitted in the written statement of defendants 13 and 14, that though Varadaraja Mudaliar the father of the first defendant and the eldest member of the family was alive, the first defendant was authorised by the members of the family to conduct the family trade carried on in this shop. We have already held that the mortgage was created to secure the repayment of a debt incurred in the course of the business conducted in that shop. It is well established as a rule of Hindu Law that the manager of a joint Hindu family conducting a family business may mortgage or sell joint family property for debts and liabilities incurred in the course of that business. In the present case, the learned

1. (1915) 28 I.C. 365. 2. (1919) 27 M.L.T. 325=62 I.C. 220.

Ramakrishna Mudaliar *v.* Manikka Mudaliar.

Varadachariar, J.

Subordinate Judge himself has held that the members of the family would be liable for the debt secured by Ex. A but he felt himself bound to hold that even for securing repayment of such a debt the first defendant had no authority to create a mortgage binding on the interests of the other members. The proposition of law stated in Mr. Maine's book and adopted in several decisions in India is that a person who is the "accredited agent" of a family so as to be able to bind the family by debts borrowed for a proper and necessary purpose can also pledge the properties of the family for debts so incurred. The plaint proceeds on the footing that the first defendant was the accredited agent of the family within the meaning of this rule. The written statement denies that the mere fact of the first defendant being authorised to manage one of the two shops of the family will empower him to alienate the family properties.

Even if the question stood as an abstract proposition of law, there is much to be said in favour of the view that if the first defendant was the accredited agent of the family for the purpose of managing Shop No. 172 to the extent of being empowered to bind the members of the family for debts incurred in connexion with that shop, he would also be entitled to pledge the credit of the family and its properties for such debts. It must be remembered that the Hindu Law with reference to the power of the father or the managing member to alienate family property, is intimately connected with the power possessed by the creditor to recover from the family property debts incurred by them for proper purposes. It seems to us meaningless to say in a case like the present (as the learned Subordinate Judge has held) that the creditor could bring the family property to sale for the realisation of the debt under Ex. A as a simple debt though it has been incurred by the first defendant but the first defendant himself could not by a voluntary alienation either secure the repayment or arrange for its discharge. The language employed by the learned Judges of the Calcutta High Court in *Sheo Pershad Singh* v. *Saheb Lal*[1] is in favour of the view that even a junior member, if he is in charge of the family business, will have all the powers of a managing member to the extent necessary for the proper conduct of the business of which he is in charge.

1. (1892) I.L.R. 20 Cal. 453.

Rama-krishna Mudaliar v. Manikka Mudaliar.

Varada-chariar, J.

Reference was made in the course of the argument to the decision in *Subbaraya Mudali* v. *Thangavelu Mudali*[1] a case which arose out of the partition suit in this very family already referred to, and reliance was strongly placed on behalf of the respondents on the fact that a mortgage executed in favour of the thirty-fifth defendant in that case by the present first defendant was set aside on appeal by this Court; but the observations in that case (at page 51) do not seem to us to support the proposition of law contended for on behalf of the respondents. It may be that the learned Judges in that case took the view that the security was not created in circumstances making the creation of a mortgage necessary, but their observations do not read as if they intended to exclude the possibility of the first defendant ever being able to create a valid mortgage even for binding debts. The learned Judges recognised that a person who is not the managing member may, if he is the accredited agent of the family, alienate joint property for family necessity, and in the earlier portion of the judgment they refer to the debts created by the present first defendant as debts incurred by an accredited agent of the family in the course of the management of the family business and on that very ground hold that the properties of the family were liable for the discharge of these debts. The judgment of Ramesam and Stone, JJ., in Appeals Nos. 406 and 467 of 1930 was also referred to in this connexion. There again, the learned Judges based their conclusion on the circumstances of the particular case, namely, that for some reason the parties made the transaction a personal one of the junior member and the plaint sought to enforce it on that basis and not on the footing that it was entered to by him as the accredited agent of the family.

The circumstances mentioned by the learned Subordinate Judge in paragraph 18 of his judgment arising out of certain proceedings for attachment before judgment in O. S. No. 49 of 1915 probably explain why Ex. A came to be executed by the first defendant alone without the other members of the family joining in it. He points out that during the pendency of the attachment application, some of the other members of the family had given an undertaking not to alienate the properties pending disposal of the application, but the first

1. (1922) 45 M.L.J. 44.

Ramakrishna Mudaliar *v.* Manikka Mudaliar.

Varadachariar, J.

defendant did not join in the undertaking. The respondents no doubt wanted to use that circumstance as an argument in favour of the nominal character of the mortgage, but as we have found on the other evidence in the case that the transaction was genuine and fully supported by consideration, that circumstance really seems to us to further the clue for the other people not joining in it though by their later conduct they have clearly shown that this transaction had their full approval. It may also be mentioned that in July, 1918, an endorsement was made on the suit bond by adjustment towards it a sum of Rs. 600 and odd due from the plaintiff to Varadaraja Mudaliar as per account of Shop No. 154. This is another circumstance indicating that the family regarded the transaction as binding on them for otherwise there was no reason for them to appropriate that amount in part satisfaction of this claim; and this endorsement is attested by the fourth defendant. Having regard therefore to the conduct of the family in not attempting to impeach the suit transaction at any time and particularly to the conduct of the fourth defendant in admitting it in the insolvency proceedings and of the Official Receiver in accepting the mortgage and selling the property subject to it and the attitude taken by defendants 1 to 7 and 9 in this litigation in remaining *ex parte* we think the proper inference is that the suit mortgage was executed by the first defendant with the knowledge and approval of all the other members of the family in the circumstances above stated; and as it has been found to be for a debt binding on the family we think that the lower Court erred in holding that the mortgage was not binding on the interests of the other members.

The result is that this appeal is allowed and a decree for sale given to the plaintiff as against the mortgaged property in terms of paragraph 18 (*a*) of the plaint. The plaintiff will be entitled to his costs both here and in the Court below. Cl. 3 of the lower Court's decree will be deleted and defendants 12 to 14 will be liable to pay to the plaintiff his costs both here and in the Court below. Time for payment six months.

K. C. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATARAMANA RAO.

G. Krishnaswami Naidu .. *Petitioner** (*Plaintiff*)

v.

The Municipal Council, Bellary, represented by its Commissioner and another .. *Respondents* (*Defendant and Nil*).

Krishnaswami Naidu *v.* Municipal Council, Bellary.

Civil Procedure Code (V of 1908), O. 1, r. 10—Claim to a vacant site against municipality—Municipality stating that ownership of the suit property was in Government as it was originally a highway—Whether Government to be made a party to the suit.

In cases where the plea of *jus tertii* is set up, it is generally considered desirable to make the person whose title is set up, a party to the suit to avoid multiplicity of litigation. Therefore in cases where the interests of the public are involved and the ownership of the Government is in question, it is very desirable and sometimes quite necessary to make the Government a party to avoid multiplicity of proceedings.

Where the action related to a vacant site and the plaintiff claimed a declaration that he was the owner thereof and that the municipality had no right to interfere with any use he made of it and the main defence of the municipality was that the site was registered in the village accounts as 'kuntha' and 'rastha', that the title thereto was in the Government, that the same had vested in it for municipal purposes and that the Government should be made a party to the suit,

Held, that if it was a claim in respect of property asserted to be a public pathway, *prima facie* the title would be in the Government and in such cases, though the right of the Municipality to assert its claim over it for municipal purposes might be lost by adverse possession, the title of the Government would not be lost unless it was shown that the property was held adversely for over a period of 60 years and it would be open to Government to remove any obstruction on the property and dedicate it again to a highway. Hence Government was a necessary party.

Sundaram Aiyar v. *The Municipal Council of Madura*, (1901) 12 M. L. J. 37: I.L.R. 25 Mad. 635 at 650 and 651, relied on.

Petition under Ss. 115 of Act V of 1908 and 107 of the Government of India Act praying the High Court to revise the Finding and Decree of the Court of the District Munsiff of Bellary dated 22nd June, 1936 and made in O. S. No. 133 of 1936.

D. R. Krishna Rao for Petitioner.

S. Ranganatha Aiyar and *K. S. Champakesa Aiyangar* for *The Government Pleader* (*K. S. Krishnaswamy Aiyangar*) for Respondents.

---

* C. R. P. No. 969 of 1936. 18th December, 1936.

Krishnaswami Naidu v. Municipal Council, Bellary.

The Court delivered the following

JUDGMENT.—This is an application to revise the order of the District Munsiff of Bellary directing that the Government should be impleaded as a party to the suit. The reason given by him is, apart from the question whether the Government is a necessary party or not, that he considers it desirable that it should be a party to the suit. The question is, whether in the exercise of his discretion under O. 1, r. 10, Civil Procedure Code, the District Munsiff has gone wrong and it is therefore unnecessary for me to consider the decisions in *Krishnayya* v. *The Bellary Municipal Council*[1] and *Nathalal Ramdas* v. *The Nadiad Municipality*[2] as they only hold that in a suit where a claim to property is asserted against the Municipality, the Government is not a necessary party. Whether the Government is a proper party or not, would depend on the facts of each case and no general rule can be laid down. This action relates to a vacant site and the plaintiff claims a declaration that he is the owner thereof and that the Municipality has no right to interfere with any use he may make of it. The main defence of the Municipality is that the site forms part of Survey No. 504-V and is registered in the village accounts as "kuntha" and "rastha" that the title thereto is in the Government and the same has vested in it for municipal purposes and that the Government should be made a party. Thus the claim is in respect of property which is asserted to be a public pathway. If it is so, *prima facie* the title would be in the Government and in such cases, though the right of the Municipality to assert its claim over it for Municipal purposes may be lost by adverse possession, the title of the Government would not be lost unless it is shown that the property was held adversely for over a period of 60 years and it would be open to the Government to remove any obstruction on the property and dedicate it again to a highway. This view was taken by Bhashyam Aiyangar, J., in *Sundaram Aiyar* v. *The Municipal Council of Madura*[3]. In remanding the case for disposal in second appeal the learned Judge considered it desirable to make the Government a party in that suit. There a similar claim was made against the Municipality and in the course of the judgment the learned Judge made the following observation:—

1. (1891) I.L.R. 15 Mad. 292. 2. (1922) I.L.R. 47 Bom. 306.
3. (1901) 12 M.L.J. 37: I.L.R. 25 Mad. 635 at 650 and 651.

Krishnaswami Naidu v. Municipal Council, Bellary.

"As some of the issues now to be sent for trial involve the question of the right of the Government to the ownership of the soil in public streets, and as all material documents bearing on this question will be in the possession of Government, I think it desirable that the Secretary of State for India in Council should be joined as a party to the suit and appeal in this and the connected second appeals."

In this case the Municipality did not assert a title in itself but set up title in the Government and claims to exercise certain rights over the site in question by virtue of the vesting of the said property by statute for limited purposes. In cases where the plea of *jus tertii* is set up, it is generally considered desirable to make the person whose title is set up, a party to the suit to avoid multiplicity, of litigation. Therefore in cases where the interests of the public are involved and the ownership of the Government is in question, it is very desirable and sometimes quite necessary to make the Government a party and avoid multiplicity of proceedings. Mr. Krishna Rao contends that the plaintiff will be put to considerable hardship by the addition of the Government as a party in the matter of proof, presumptions of law and similar matters by reason of the peculiar position of the Government. True, but that would not affect the question where a declaration of absolute title to property is asked for as against persons in whom the property has for the time being vested for specific purposes, without the free-hold vesting in them. It is desirable that the person really interested in the property should be a party to the suit.

One of the reasons given by Bhashyam Aiyangar, J., is that most of the documents bearing on title will be in possession of the Government and not with the Municipality. Mr. Krishna Rao says that in most cases Government declines to produce documents on the ground of privilege. I do not expect the Government to take an unreasonable attitude and the Court will certainly afford all facilities in the matter of production of documents by the Government.

One matter I must notice. It is surprising that the Government should have taken the plea that notice under S. 80, Civil Procedure Code, should have been given to it and the absence of any such notice is a bar to any claim against it. Mr. Champakesa Aiyangar for the Government frankly admits that this plea ought not to have been taken and states it would not be pressed.

Krishnaswami Naidu v. Municipal Council, Bellary.

The decision of the lower Court in exercising its discretion in making the Government a party to the suit is correct and I do not propose to interfere with it in revision. In the result the Civil Revision Petition is dismissed with costs.

K. C. —— *Petition dismissed.*

PRIVY COUNCIL.

[On appeal from the Supreme Court of the Island of Ceylon.]

PRESENT:—LORD ROCHE, SIR JOHN WALLIS AND SIR GEORGE RANKIN.

P.C.

Alexander Perera Chandarasekera v. The King.

Alexander Perera Chandarasekera *alias* Alisandiri .. *Appellant**

v.

The King .. *Respondent.*

Evidence—Case of murder—Information given by deceased before death—Verbal statement—What constitutes—Questions put to injured person—Answers by signs and by nod of head—Admissibility in evidence—Ceylon Evidence Ordinance (XIV of 1895), S. 32.

The accused was tried and convicted of the offence of murder. The evidence against the accused consisted among other things of information given by the deceased before her death. The deceased was at that time badly wounded and was unable to speak but she was fully conscious and able to understand what was said to her and to make signs. She was asked questions by one of her neighbours in the presence of other persons. At first she indicated by signs that the person who cut her neck was a carter of one present there, that the said person had previously assaulted a constable, and finally when the question was put to her whether it was the particular accused who did it she nodded her head in assent and she was subsequently removed to the hospital and she died there.

Held, that the information given by the deceased before her death was a 'verbal statement' within the meaning of S. 32 of the Ceylon Evidence Ordinance of 1895 and was properly admitted in evidence against the accused.

It is however necessary to use great caution in the reception of evidence of this character and in the use to be made of it. Evidence of signs of an ambiguous or uncertain character ought not to be admitted at all and in many cases the evidence though admissible might be of little weight.

Queen-Empress v. *Abdullah*, (1885) I.L.R. 7 All. 385 (F.B.); *Emperor* v *Sadhu Charan Das*, (1921) I.L.R. 49 Cal. 600; *Chandrika Ram Kahar* v *King-Emperor*, (1922) I.L.R. 1 Pat. 401 and *Mam Chand* v. *Crown*, (1924) I.L.R. 5 Lah. 324, referred to.

L. M. D. DeSilva (of Ceylon Bar) for Appellant.

Donald Somervell and *Kenelm Preedy* for the Crown.

12th November, 1936. Their Lordships' judgment was delivered by

---

* P. C. Appeal No. 30 of 1936. 12th November, 1936.

P.C. — Alexander Perera Chandarasekera *v.* The King. — Lord Roche.

Lord Roche.—This is an appeal by special leave against a judgment and sentence of the Supreme Court of the Island of Ceylon dated 1st May, 1935, whereby, after a trial before a Commissioner and a jury, the appellant was sentenced to death for the murder of a woman named Salami Nadatchi on 15th May, 1934. The jury had returned a verdict of guilty by a majority of six to one. The main point raised in the appeal was whether information given by the deceased woman before her death was a statement within the meaning of S. 32 of the Ceylon Evidence Ordinance No. 14 of 1895, and as such was admissible in evidence by virtue of that section. This information was admitted in evidence and directly implicated the appellant. The material part of the section is as follows:—

" *Statements by persons who cannot be called as witnesses.*

" 32. Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case, appears to the Court unreasonable, are themselves relevant facts in the following cases:—

" (1) When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question."

The facts of the case as proved by evidence not the subject of objection were as follows:—

The deceased was a widow living alone in a two-roomed one-storied house on a plot of land lying between the estates of one Stanley Jayawardene and one Collin Silva. The deceased's house was about 150 yards from the estate bungalow of Collin Silva where a witness named Rengam Arumugam watcher of the estate lived with his wife. The accused man had worked as a carter for Stanley Jayawardene's estate and lived in the neighbourhood, but recently and until shortly before 15th May, 1934, he had been in the employment of two brothers Mohamadu a few miles away. He had been discharged from this employment some days before 15th May and was then unemployed. On the day in question he had been to the place of business of the brothers Mohamadu, had borrowed a bicycle from one of them, and gone home on it to dinner at his house, which he left after dinner about 2 p.m. Between 2 and 3 p.m. he was seen near the house of the deceased woman in conversation with her. Between 3 and 4 p.m. he was seen riding the bicycle away from that locality and was described by a witness (Charles) as dismounting and as going into a thicket and

P.C.
Alexander Perera Chandarasekera
v.
The King.
Lord Roche.

lurking there and behaving in a suspicious and excited manner. He then, after bathing in a stream, went back on the bicycle to the place of business of the brothers Mohamadu where he was later arrested. Meanwhile at about 4 p.m. the deceased had come in a terribly wounded condition to the bungalow of Collin Silva occupied by Arumugam. The principal wound was one about 4 inches in length extending from the right side of her neck across the throat to about ½ an inch on the left side of the middle line. There were minor wounds on the face and head and her ears were severed and torn. She had evidently made her way unaided from her own house and was found on the verandah of Collin Silva's bungalow. There the interrogation took place from which the evidence in dispute was derived and in consequence the accused was arrested the same afternoon at the Mohamadus' place of business. The statement of the accused, made on 16th May, was of the nature of an alibi and in particular was to the effect that from 12-30 p.m. onwards he was at the boutique. This was proved at the trial to be untrue as appears from the evidence summarised above. At the trial the accused did not elect to give evidence nor was evidence called on his behalf. At the house of the deceased woman the main features of the attack upon her were plainly to be seen. There was blood on a camp cot in the outer room upon which the deceased must have been sitting or lying when attacked. The room was disturbed and jewellery which she possessed was missing. The door from this room to the outside was locked and the wounded woman, as was indicated by blood marks, made her way into the inner room and then out of a window and thence by a path to Collin Silva's bungalow. There she was bandaged and propped up against a wall with cushions. The throat wound rendered her unable to speak; but she was fully conscious and able to understand what was said to her and to make signs and to nod her head, though slightly. She was asked questions both by the police and by neighbours and in particular by one Martin Perera—a carter who had worked with the accused for Mr. Stanley Jayawardene and who also knew the deceased woman. Mr. Stanley Jayawardene was present at the material time and there was no ground for suggesting that the evidence to which objection was taken was derived solely or mainly from police sources, or that Perera or Mr. Jayawardene, who gave evidence of what took place, were witnesses with ill-will to the appellant. The greater part of

P.C.
Alexander Perera Chandarasekera *v.* The King.
Lord Roche.

the interrogation was conducted by Martin Perera, who spoke to the wounded woman in Sinhalese. The course and result of it was as follows:—Asked who cut her neck, the deceased indicated by signs the height of the person and later pointed to Mr. Jayawardene and also made signs as of goading a bull. The accused had worked for Mr. Jayawardene as a carter. She also pointed to a constable and then patted or slapped her cheek two or three times. The accused had some time previously assaulted a constable by slapping his face and this was a matter of common knowledge. Probably at this stage—though the witnesses were not entirely in agreement as to the order of events—Martin Perera put the direct question: "Was it Alisandiri?"—the name by which the accused was ordinarily known. The wounded woman nodded her head in answer to this question. As to this fact and that it was a nod of assent no witness seemed in any doubt. The wounded woman was removed to hospital and died there and, as has been already stated, the appellant was arrested and charged.

At the trial the admissibility of the evidence in question seems to have been raised by counsel for the defence as soon as the jury was empanelled and sworn. The jury was quite properly ordered to retire and the question of admissibility was argued and decided in their absence. An authority *Queen-Empress* v. *Abdullah*[1] which will be referred to later in this judgment was cited to the learned Commissioner, and in accordance with that authority he ruled that evidence as to signs made in answer to questions put to the deceased was admissible but that statements of witnesses as to what interpretation they put upon the signs were not admissible. It was said upon the argument of this appeal that the latter part of the ruling was not observed, and that evidence ruled inadmissible was in fact given. It is difficult to adhere to a clear line of division between the description of signs and the interpretation of signs, and it may be that in some respects witnesses trespassed beyond the line and so usurped what obviously is the function of the jury; but their Lordships observe that in some instances the matter complained of was elicited by cross-examination on behalf of the accused. Their Lordships are of opinion that no substantial grievance can be made out in this regard, still less any real or serious miscarriage of justice. The main question is whether any part of the evidence as to

1. (1885) I.L.R. 7 All. 385 (F.B.).

P.C.
Alexander Perera Chandarasekera *v.* The King.
Lord Roche.

what passed between the deceased and Perera should have been admitted. In their Lordships' opinion the ruling of the learned Commissioner was correct. It is to be observed that in the section the word used is "verbal" and not "oral" which is used elsewhere in the Ordinance, as for example in S. 3 and S. 119 in reference to evidence given in Court. It is unnecessary to decide whether the question put "Was it Alisandiri?" and the nod of assent would have constituted an oral statement made by the deceased, but their Lordships are clearly of opinion that it constituted a verbal statement made by her. The case under consideration closely resembles the case of a person who is dumb and is able to converse by means of a finger alphabet. Upon proper evidence proving the words used in a conversation so held their Lordships think that a statement so made would be a verbal statement within the meaning of the section. So here their Lordships think that there was proper and sufficient evidence of a verbal statement by the deceased to the effect that it was the accused who cut her neck. As to the remainder of the evidence as to signs made by the deceased it was necessarily given in order that it might be understood in what circumstances and context the vital question came to be asked and to be answered. Mention has already been made of the decision in Allahabad upon which the learned Commissioner relied to support his ruling. This was a decision of the Full Court and was pronounced in the year 1885. Since that time it has been followed in Bengal in the case of *Emperor* v. *Sadhu Charan Das*[1] in Patna in *Chandrika Ram Kahar* v. *King-Emperor*[2] and in Lahore in *Mam Chand* v. *The Crown*[3]. The material provisions of the Evidence Act in India are identical with the provisions of the Ceylon Ordinance. For the reasons already given their Lordships think that those decisions were correct and that the learned Commissioner was right in following them.

Observations were properly and forcibly made by counsel for the appellant as to the caution required in the reception of evidence of this character and in the use to be made of it. It is, of course, true that evidence of signs of an ambiguous or uncertain character ought not to be admitted at all and that in many cases, the evidence though admissible might be of little weight. It is no doubt also true that answers to questions of

1. (1921) I.L.R. 49 Cal. 600.
2. (1922) I.L.R. 1 Pat. 401.
3. (1924) I.L.R. 5 Lah. 324.

P.C.

Alexander Perera Chandarasekera *v.* The King.

Lord Roche.

a leading character may be of little weight, but in the circumstances of this case Martin Perera's question was in its context other than a mere leading question. At any rate all such matters are matters for the jury, going to the weight and not to the admissibility of the evidence, and there is nothing here to show that anything took place in this connection calling for or justifying the interference of this Board. Unfortunately neither the advisers of the appellant nor the Crown were able to trace or produce any note of the summing up. In the absence of any suggestion, based on any other materials, that the summing up was open to objection, their Lordships can only assume that the learned Commissioner who heard the argument on the admissibility of the evidence with regularity, and ruled upon it, as their Lordships have decided, correctly, also directed the jury adequately and properly as to the weight of the evidence. The result seems to their Lordships to be this: Apart from the evidence proceeding from the deceased woman, the other evidence was not sufficient to warrant a conviction, but at the same time that other evidence was not merely consistent with the deceased's statement but pointed in the same direction. It was a case in which, if the deceased's statement was received, and was believed, as it evidently was by the jury, to be clear and unmistakable in its effect then a conviction was abundantly justified and indeed inevitable. For these reasons their Lordships have felt themselves impelled to advise His Majesty that this appeal should be dismissed.

Solicitors for Appellant: *Douglas, Grant and Dold.*

Solicitors for Respondent: *Burchells.*

B. V. V. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE CORNISH.

Al. St. An. Chidambaram Chettiar .. *Appellant** (*21st Plaintiff*)

v.

Al. Vr. P. Pethaperumal Chettiar and others .. *Respondents (Plaintiffs 1 to 6 and 10 to 20 and Defendants 1, 2, 3, 9, 10, 14 to 35, 40 to 49, 54 and 55).*

Chidambaram Chettiar *v.* Pethaperumal Chettiar.

Civil Procedure Code (V of 1908), O. 40, r. 1—Receiver whether could be appointed in a declaratory suit—Test is whether property is in dispute

* C. M. A. No. 315 of 1936. 15th September, 1936.

Chidambaram Chettiar v. Pethaperumal Chettiar.

between parties—Whether when suit was pending in appeal to the High Court, a general Receiver could be appointed by the trial Court—Circumstances when Receiver could be appointed and by whom.

If there is property in dispute between the parties to a suit, and the court thinks it expedient that the property should be protected for the benefit of the party ultimately entitled to it pending the suit, the Court can properly appoint a receiver of it, even in a suit which prays for no other relief than a declaration of some particular right or title.

Vythilinga Pandarasannadhi v. *The Board of Control, Sri Thiagarajaswami Devasthanam, Tiruvarur,* (1931) 61 M.L.J. 904 and *Amar Nath* v. *Mt. Tehal Kuar,* A.I.R. 1922 Lah. 444, followed.

The court's power to appoint a receiver is limited to the case where the proceedings are still pending before it. Either the suit must be pending, and it will be pending after a preliminary decree but before final decree, or the proceedings in execution of a final decree must be pending. In either event the court in which the suit or proceedings are pending will have seisin of the suit or of the property subject to exemption and this will be the basis of the court's power to appoint a receiver of it.

Where in a case an appeal was pending to the High Court against a decree in the plaintiff's suit and the High Court while upholding the appointment of a special receiver appointed in that suit, stayed the passing of the final decree as regards that in which a preliminary decree only had been made by the first Court,

Held, that in the circumstances the first court had no jurisdiction to appoint a general Receiver of the properties in the suit, as the appellate court had become seised of the whole case and hence the High Court was the only Court which had power to appoint a receiver under O. 40, r. 1 of the Civil Procedure Code.

Chenna Reddi v. *Pedda Obi Reddi,* (1909) 19 M.L.J. 388: I.L.R. 32 Mad. 416 (F.B.), referred to.

Appeal against the order of the Court of the Subordinate Judge of Devakkottai dated 22nd July, 1936, and made in I.A. No. 257 of 1936 in O. S. No. 78 of 1932.

M. Patanjali Sastri for Appellant.

V. V. Srinivasa Aiyangar, K. S. Krishnaswami Aiyangar and *P. S. Sarangapani Aiyangar* for Respondents.

The Court delivered the following

JUDGMENT.—The appeal is against the order of the Subordinate Judge appointing a Receiver. The appellant was the twenty-first plaintiff in a suit brought by a group of persons of the *A.L.* family against a group of defendants representing the *V.R.* family for a declaration that both these families were entitled to the management and trusteeship of certain temple properties under a scheme framed by agreement between the families in 1907. The plaint prayed further reliefs against the first defendant in particular by way of an injunction and for an account. The suit was decreed. The right of all the mem-

Chidambaram Chettiar v. Pethaperumal Chettiar.

bers of the *A.L.* and *V.R.* families to the trusteeship, as also the validity of the 1907 agreement and scheme, were declared; the first defendant was restrained from interfering with the rights of the *A.L.* family and he was directed to account for his management. For this purpose a commissioner was appointed and this commissioner was also appointed receiver for the special purpose of at once realising all the debts due to the devasthanam from the members of the *A.L.* and *V.R.* families and from strangers except tenants.

An appeal has been filed against the decree. It need only be observed with regard to the history of this dispute, subsequent to the decree, that the family discord and consequent difficulty in the management of the devasthanam property have continued unabated. An application was subsequently made to the Sub-Judge by the eleventh defendant praying that first plaintiff be directed not to act by himself in the management and that if he did not agree the Receiver appointed specially should be appointed to generally manage the affairs of the devasthanam. This application was resisted by the first plaintiff. The Court dismissed the application upon the ground that the Court has no further jurisdiction that the decree being under appeal to the High Court, the High Court was the tribunal to which the power of appointing a Receiver belonged. Twelve months or so later a fresh application was made to the Subordinate Court for the appointment of a general Receiver, this time by the plaintiffs other than twenty-first plaintiff who objected to the application. The Sub-Judge on this occasion, differing from his predecessor, held that he had jurisdiction to appoint a general Receiver. Hence the present appeal.

The learned Counsel for the appellant has urged two objections to the validity of the order of the Sub-Judge. Firstly, he has contended that it was not competent to the Court to appoint a Receiver in a declaratory suit; and, secondly, that the decree having in part become final and an appeal being pending, the lower Court had no jurisdiction to appoint a general Receiver.

With regard to the first contention I think it cannot be maintained. There is, of course, no scope for the appointment of a Receiver unless there is some property for him to receive. But whenever there is property which is the subject of

Chidambaram Chettiar v. Pethaperumal Chettiar.

dispute between litigants, or which is affected by the litigation, a Receiver of it can be appointed by the Court if the Court thinks it just and convenient to make the appointment. In *Veeraraghava Thathachariar* v. *Krishnaswami Thathachariar*[1] where the suit was for a declaration that a scheme was binding on the parties and alternatively for the settlement of a scheme, and for the appointment of a Receiver, it was held that the Court had power to appoint a Receiver "the whole aim and object of the suit" it was said:

"Is to regulate the collection and distribution of the property of the temple and even though there is no application for the removal of the Dharmakartha (in which case no doubt the Court would have power to appoint a Receiver) the subject is the same in both cases, namely, the property of the temple".

That was a suit governed by S. 503 of the former Procedure Code which limited the power of the Court to appoint a Receiver of property "the subject of the suit". The power of the Court under the new Code is certainly not less than it was under S. 503 of the old. The language of O. 40, r. 1 of the present Code has purposely been more widely expressed. I feel no doubt that if there is property in dispute between the parties, and the Court thinks it expedient that the property should be protected for the benefit of the party ultimately entitled to it pending the suit, the Court can properly appoint a Receiver of it, even in a suit which prays for no other relief than a declaration of some particular right or title. This is in accordance with *Vythilinga Pandarasannadhi* v. *The Board of Control, Sri Thiagarajaswami Devasthanam, Tiruvarur*[2] and *Amar Nath* v. *Mt. Tehal Kuar*[3].

The second point taken for the appellant appears to me to have more substance in it. O. 40, r. 1 empowers the Court, where it appears just and convenient, by order to appoint a receiver of any property, whether before or after decree. "The Court" is not necessarily the trial Court. The Court which makes the order for a Receiver after decree may be the Court which passed the decree, or it may be the Appellate Court which has become seized of the matter by reason of an appeal. The Court which passed the decree has, for example, the power conferred on it by S. 51 of the Code to appoint a Receiver for the execution of the decree. But that is because

1. (1908) 20 M.L.J. 638.
2. (1931) 61 M.L.J. 904.
3. A.I.R. 1922 Lah. 444.

Chidambaram Chettiar v. Pethaperumal Chettiar.

the Court which passed the decree still has seisin of the property in suit. But if execution has been stayed it certainly would not have this power.

I think that a Court's power to appoint a Receiver is limited to the case where the proceedings are still pending before it. Either the suit must be pending, and it will be pending after a preliminary decree but before final decree or the proceedings in execution of a final decree must be pending. In either event the Court in which the suit or proceedings are pending will have seisin of the suit or of the property subject to exemption; and this will be the basis of the Court's power to appoint a Receiver of it.

A decree may be partly preliminary and partly final. It was so in the present suit. But this is no reason why the principle which I have just stated should not apply. In the present instance an appeal is pending to the High Court against the decree in the plaintiff's suit, and the High Court while upholding the appointment of the special Receiver appointed in that suit, has stayed the passing of a final decree as regards that in which a preliminary decree only had been made by the first Court.

In these circumstances has the first Court any further jurisdiction to appoint a general Receiver of the property in suit? It seems to me that the question has been put beyond dispute by the Full Bench ruling in *Chenna Reddi* v. *Pedda Obi Reddi*[1]. It was there said by Sir John Wallis:—

"Now after an appeal has been filed, the appellate Court is seised of the case and should no doubt be applied to rather than the Court of first instance unless the law expressly enjoins the contrary as was held in *Pichuvaiyangar* v. *Seshaiyangar*[2] but it is a very different thing to press this principle so far as to say that the act of a party in filing an appeal deprives the Court of first instance of power to dispose of an application which has been properly made to it in the exercise of its jurisdiction".

In the Full Bench case an application for review had been presented before an appeal had been preferred, and it was held that the subsequent filing of the appeal did not deprive the Court which gave judgment from entertaining the application to review its judgment. And in *Palaniappa Chetty* v. *Subrahmanyia Chetty*[3] it was held that upon the express language of O. 9, r. 13 that the Court which passed an *ex*

1. (1909) 19 M.L.J. 388: I.L.R. 32 Mad. 416 (F.B.).
2. (1894) 5 M.L.J. 39: I.L.R. 18 Mad. 214 (F.B.).
3. (1921) 41 M.L.J. 90: I.L.R. 44 Mad. 731.

Chidambaram Chettiar *v.* Pethaperumal Chettiar.

parte decree being the only Court to which application to set it aside could be made, the Court's power to dispose of such an application was not ousted by the filing of an appeal against it.

I think that when a decree has become final, and an appeal is pending, there is no room for any such exceptions to the general rule stated by the Full Bench in respect of the power to appoint a Receiver of the property in the suit. The appellate Court has become seised of the whole case. The Subordinate Court had then no further control over it. The High Court was the Court which then had the power to appoint a Receiver under O. 40, r. 1. The Sub-Judge's order appointing a Receiver was therefore beyond his powers and it must be set aside. The appeal is allowed with costs.

K. C. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

P. P. Sundararaja Aiyangar .. *Petitioner* (Defendant)*

v.

P. L. Mannarsawmi and R. Narayana Aiyangar Firm by managing partner R. Narayana Aiyangar .. *Respondent (Plaintiff).*

Sundararaja Aiyangar *v.* Mannarsawmi.

Partnership Act (IX of 1932), Ss. 69 and 74—Partnership unregistered—Suit against a debtor for money borrowed before the Act came into force—S. 74 whether affects it—Suit not maintainable.

Where an unregistered partnership sued a debtor of the firm and the question arose whether in view of the fact that money was borrowed before the Partnership Act came into force, the suit was maintainable in the face of S. 69 of the Act,

Held, that S. 69 makes it clear that no suit of the description could be brought after the Act came into force. S. 74 although it keeps intact any rights that may have accrued before the Act came into force, does not affect the enforcement of the right by means of a suit which is governed by S. 69. In view of the plain wording of S. 69 the suit was not maintainable.

Petition under S. 25 of Act IX of 1887 praying the High Court to revise the decree of the Court of the District Munsif of Tanjore in S. C. S. No. 810 of 1934.

R. Kesava Ayyangar for Petitioner.

K. V. Sesha Ayyangar for Respondent.

The Court delivered the following

JUDGMENT.—This was a suit by an unregistered partnership against a debtor. The only question raised in the suit

* C. R. P. No. 343 of 1935. 4th January, 1937.

Sundararaja Aiyangar *v.* Mannarsawmi.

and in this petition is whether, in view of the fact that the money was borrowed before the Indian Partnership Act came into force, the suit is maintainable in the face of S. 69 of the Act.

S. 69 makes it clear that no suit of the description can be brought after the Act comes into force. It is argued that this is controlled by S. 74; but S. 74 in my opinion although it keeps intact any rights that may have accrued before the Act came into force, does not affect the enforcement of that right by means of a suit which is governed by S. 69. By virtue of S. 1 of the Act, S. 69 came into force one year after the rest of the Act and undoubtedly the purpose of this is to give persons a year's grace in bringing suits of this description or in getting themselves registered. In view of the plain wording of S. 69, I find that the learned District Munsif was wrong in holding that this suit was maintainable and in granting a decree. The petition is therefore allowed with costs throughout and the suit dismissed.

K. C. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE CORNISH.

Parimi Chakrapani Naidu .. *Appellant* (Defendant).*

v.

Mathapalli Venkataraju .. *Respondent (Plaintiff).*

Chakrapani Naidu *v.* Venkataraju.

Damages—Obstruction to putting up of a bund—Order of Magistrate under S. 145, Criminal Procedure Code—Suit in consequence—Right to bund established—Obstruct or if liable in damages for loss subsequent to the Magistrate's order.

The plaintiff put up a bund on a water channel and as the defendant disputed the plaintiff's right to put up such a bund he (defendant) removed it and applied to the Magistrate under S. 145, Criminal Procedure Code. The Magistrate after taking statements from both parties made an order restraining the plaintiff from raising a bund or diverting the water until he obtained a decree of a Civil Court in his favour. Accordingly the plaintiff got a decree in his favour. It was not alleged that in removing the bund the defendant had acted maliciously. The plaintiff filed a suit for damages in respect of the loss of cultivation of his fields for 3 years *subsequent* to the order of the Magistrate.

Held, that the defendant was not liable as the damage was not directly due to the defendant's wrongful act as there supervened the order of the Magistrate which was the direct cause of this damage.

No suit will lie against a person for procuring an erroneous order from a Magistrate.

Second appeal against the decree of the Court of the Subordinate Judge of Cocanada in A.S. No. 117 of 1930 pre-

* S. A. No. 261 of 1933. 26thFebruary, 1937.

Chakrapani Naidu v. Venkataraju.

ferred against the decree of the Court of the District Munsif of Cocanada in O.S. No. 42 of 1928.

P. V. Rajamannar and *K. Subba Rao* for Appellant.

Ch. Raghava Rao for Respondent.

The Court delivered the following

JUDGMENT.—The defendant is the appellant. He has been held liable by the lower appellate Court to damages for the loss to the plaintiff of three years' cultivation of his fields on the ground that this loss was caused initially by the defendant's wrongful obstruction to the plaintiff's right to bund a water channel. The facts are that plaintiff and defendant had a dispute over the former's right to bund this channel. The plaintiff put up a bund and the defendant removed it. The defendant then laid an information under S. 145 of the Criminal Procedure Code. On that information the Magistrate, after taking statements from both parties, made an order that the plaintiff should not raise a bund or divert the water from the channel until he had obtained a decree or order of a competent Court adjudging him to be entitled to raise such bund. A subsequent suit by the plaintiff resulted in his right to bund the channel being upheld. The Magistrate's order was made on 21st November, 1924, and plaintiff's claim for damages is in respect of the loss of cultivation of his fields for the years 1925, 1926 and 1927. The allegation in the plaint in para. 4 is :

"The defendant afterwards instituted proceedings under S. 147 of the Criminal Procedure Code and got an order restraining the plaintiff from raising a cross-bund, consequently the plaintiff's lands were obliged to be kept fallow".

But in para. 8 the cause of action is laid generally on the loss caused to the plaintiff by the defendant's obstruction to the plaintiff's right to bund the channel.

The plaint leaves it somewhat obscure what exactly the plaintiff's cause of action is. But his learned Counsel has argued the case that the defendant's wrongful interference with the plaintiff's bund being the primary cause of damage suffered by the plaintiff, the order of the Magistrate made upon the initiative of the defendant, was only a secondary cause which cannot relieve the defendant of his liability for his initial wrongful act. I think that this position is unsustainable. There can be no doubt that the immediate and proximate cause of the plaintiff being deprived of his right to bund the channel was the order of the Magistrate. Indirectly it was due to the

Chakrapani Naidu *v.* Venkataraju.

defendant's act in interfering with the plaintiff's bund and to his initiating proceedings in anticipation of a possible breach of the peace. But the direct cause of the plaintiff's deprivation of the right to take water was the Magistrate's order. There is no allegation in the plaint that the defendant in taking these proceedings was actuated by malice. If he had acted maliciously his position might have been different. It must, however, be assumed that he acted from proper motives. The order of the Magistrate being an independant act in the course of his official duties, the defendant cannot be held responsible for it or for the damage suffered by the plaintiff in consequence of it. The Magistrate's order was, to use Lord Cave's expression in *Harnett* v. *Bond*[1] *"a novus actus interveniens* sufficient to break the chain of causation" between the defendant's wrongful act in removing plaintiff's bund and the injury suffered by the plaintiff in consequence. The House of Lords affirmed the judgment of the Court of appeal in the above case, reported in *Harnett* v. *Bond*[2] where Scrutton, L.J., said:

> "There is no doubt that the action of a third party does not necessarily break the chain of causation and make subsequent damage too remote. . . . . But it appears to me that where there comes in the chain the act of a person who is bound by law to decide a matter judicially and independently, the consequences of his decision are too remote from the original wrong which gave him a chance of deciding. It was on this principle that in *Lock* v. *Ashton*[3] it was decided that a defendant who had wrongfully taken a person into custody and brought him before a Magistrate was not liable for the subsequent remand by the Magistrate, which was a judicial act".

No suit will lie against a person for procuring an erroneous order from a Magistrate. See *Mina Kumari Bibi* v. *Surendra Narain Chakravarty*[4]. I am, therefore, of opinion that the lower Court's judgment was wrong. The decree of the lower Court is set aside and this appeal is allowed with costs.

S. V. V. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW.

Kaliyappa Udayan .. *Petitioner* (Accused No. 1).*

Kaliyappa Udayan, *In re.*

Evidence Act (I of 1872), Ss. 123 and 124—Privilege when can be claimed for statements—Statements during investigation by a forest officer whether privileged—Accused has a right to move for their production in Court.

---

1. (1925) A. C. 669.
2. (1924) 2 K.B. 517.
3. (1848) 12 Q.B. 871.
4. (1909) 3 I.C. 12.

* Cr. R. C. No. 835 of 1936. (Cr. R. P. No. 775 of 1936).

4th February, 1937.

Kaliyappa Udayan, *In re.*

Where certain accused were charged under S. 21 (*f*) of the Madras Forest Act and in the course of the inquiry the first accused moved for the production of certain statements recorded by the Forest Officer during the investigation, but privilege was claimed under Ss. 123 and 124 of the Evidence Act, on the questions whether (1) such privilege could be claimed and (2) whether, if no such privilege could be claimed and the statements had to be produced, they would be admissible in evidence.

Held, (1) that no privilege could be claimed in respect of the statements. They did not relate to any affairs of state nor could they be said to be communications made in official confidence the disclosure of which would be injurious to public interests. The statements were recorded in the course of an investigation permitted by law and there would be absolutely no reason why the record of such an investigation should not be made available to the Court which heard the same case judicially.

(2) that it would be for the Magistrate making the enquiry, after perusing the statements and considering the objections as to their admissibility, to say whether the statements were admissible in evidence or not.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Second Class Magistrate, Tiruvannamalai, dated the 16th day of October, 1936 and made in C. C. No. 1623 of 1935.

A. S. Sivakaminathan for Petitioner.

The Public Prosecutor on behalf of the Crown.

The Court made the following

ORDER.—The petitioner and several others were accused of being in possession of billets of illicit sandalwood suspected to have been removed from a certain reserve forest and they were charged with an offence punishable under S. 21 (*f*) of the Madras Forest Act.

Apparently in the course of the enquiry there was an attempt made to convert the charge into one of theft or dishonest detention of stolen property. In the course of the enquiry the first accused moved the Court for the production of certain statements recorded by the Forest Range Officer in the course of his investigation in the present case from accused 2 and 3 and others. Summons for the production of these records appears to have been issued and they appear to have been actually produced in Court. Privilege was claimed under Ss. 123 and 124 of the Indian Evidence Act. The Magistrate thought that such privilege could not be claimed and even addressed the District Forest Officer on the subject expressing that opinion. (*Vide* the Sub-Magistrate's letter dated 27th April, 1936, to the District Forest Officer.

The Forest Officer appears to have contended that the statements recorded at the time of the investigation were not admissible as legal evidence. Finally the Magistrate's successor passed an order disallowing the request of the accused for the production of the statement in question.

The last order of the Magistrate which is now sought to be revised is not very clear as to the ground on which the request of the accused was refused. There is a reference to the privilege claimed under S. 123 of the Indian Evidence Act in the order and also to the objection made by the vakil for the second accused on the ground that the records were inadmissible in evidence. The learned Sub-Magistrate appears to have mixed up these two questions which ought to have been kept separate.

The first question was can privilege be claimed in respect of these statements under Ss. 123 and 124 of the Indian Evidence Act? And the second was "if no such privilege can be claimed and the statements have to be produced in Court would they be admissible in evidence?

So far as the first question is concerned it is clear that no privilege can be claimed under Ss. 123 and 124 of the Evidence Act, in respect of these statements. They do not relate to any affairs of state nor can they be said to be communications made in official confidence the disclosure of which would be injurious to public interests. The statements were recorded in the course of an investigation permitted by law and there is absolutely no reason why the record of such an investigation should not be made available to the Court which hears the same case judicially.

I have therefore no doubt that the production of the statements in question ought to have been insisted upon by the Magistrate and the statements should have been permitted to be inspected by the first accused at whose instance they were called for.

As regards the other question whether any of the statements are admissible in evidence in the absence of the statements themselves it is not possible to pronounce any opinion. It will be for the Magistrate after perusing the statements and considering the objections as to their admissibility that may be raised before him to decide for himself whether any particular statement which is sought to be put in as evidence is admissible

Kaliyappa Udayan, *In re.*

or not. The Sub-Magistrate is therefore directed to proceed with the enquiry in the light of the above observations.

K. C. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATARAMANA RAO.

S. P. Swami Naidu .. *Petitioner** (*Petitioner*)

v.

Natesa Aiyar *alias* Subramania Aiyar and another .. *Respondents* (*Respondents*).

Swami Naidu v. Natesa Aiyar.

Civil Procedure Code (V of 1908), O. 33, r. 9 (c)—Suit on mortgage as pauper—Plaintiff claiming the full amount himself—Sixth defendant claiming half of it as joint payee—Agreement between them accepting sixth defendant's title—If an agreement falling under O. 33, r. 9 (c).

O. 33, r. 9 (*c*) contemplates an agreement in and by which an interest is transferred or created in the subject-matter of the suit in favour of a person who is not entitled to it and would not cover a case where by virtue of a family settlement between the parties there is a recognition of an antecedent title in one of the parties to the suit.

Where therefore a suit was filed *in forma pauperis* by *C* on a mortgage executed in favour of *A* and *B*, claiming that the mortgage was executed in their favour benami for his father and that he was therefore entitled to the full amount, impleading thereto, among others, the mortgagors and *B's* son, who contended that it was not benami, and where pending the suit *C* and *B's* son as heir of *B* was entitled to half the amount thereby declaring that *B* was from the inception of the mortgage entitled to half,

Held, that it is not an agreement contemplated by O. 33, r. 9 (*c*) of the Civil Procedure Code on foot of which the plaintiff *C* can be dispaupered.

Petition under S. 115 of Act V of 1908, praying the High Court to revise the order of the Court of the Subordinate Judge of Coimbatore dated 4th March, 1936, and made in I.A. No. 149 of 1936, in O. S. No. 240 of 1934.

S. Muthiah Mudaliar and *M. Krishna Bharathi* for Petitioner.

L. A. Gopalakrishna Aiyar for Respondents.

The Court delivered the following

JUDGMENT.—This is a petition to revise the order of the Additional Subordinate Judge of Coimbatore declining to dispauper the plaintiff under O. 33, r. 9, Civil Procedure Code. The plaintiff instituted the suit, out of which this petition arises, on a mortgage executed by defendants 1 to 4, in favour of his mother and deceased sister, the mother of the sixth defendant in the suit. The case on which the plaintiff came to

* C. R. P. No. 574 of 1936. 6th January, 1937.

Swami Naidu *v.* Natesa Aiyar.

Court was, though the mortgage was executed in favour of both the plaintiff's mother and sister, they were really benamidars for the father of the plaintiff, and the plaintiff was the person solely entitled to the amount due under the mortgage, and therefore he prayed for a mortgage decree for the entire amount to be passed in his favour. The case of the sixth defendant is that his mother is entitled to half the amount, that the allegations relating to benami are false and that he was entitled to half the mortgage amount in the right of his mother. Among the issues framed in the suit, are the following:—

1. " Was the mortgage deed in question taken by the plaintiff's father benami in the names of the plaintiff's mother and sister as alleged by the plaintiff?"

6. " Is the sixth defendant entitled to any portion of the mortgage amount?"

On 13th December, 1936, the plaintiff and sixth defendant filed a joint memo. into Court in and by which the plaintiff agreed that the sixth defendant is entitled to one half of the amount. The result of the arrangement embodied in the said memo. is that the plaintiff gives up his contention as to benami. The fifth defendant who is a subsequent purchaser of the suit property has filed an application to dispauper the plaintiff on the ground that the plaintiff has subsequent to the suit entered into an arrangement with reference to the subject-matter of the suit in and by which the sixth defendant has obtained an interest therein and therefore he is liable to be dispaupered. The lower Court has negatived the contention and dismissed the application and the question is, is the view of the lower Court sound? I am inclined to think it is. O. 33, r. 9 (*c*) contemplates an agreement in and by which an interest is transferred or created in the subject-matter of the suit in favour of a person who is not entitled to it, and would not cover a case such as this where by virtue of a family settlement between the parties there is a recognition of an antecedent title in one of the parties to the suit. The joint memo. does no more than declare that the plaintiff's sister was from the inception entitled to half the entire mortgage amount and that the sixth defendant as her heir would be entitled to it. O. 33, r. 9 (*c*) is not intended to affect cases of this description. Mr. Krishna Bharathi contends that as under the memo. the plaintiff is now entitled to get a decree for half the amount the lower Court ought to have found out whether the plaintiff

Swami Naidu v. Natesa Aiyar.

would not be in a position to pay the court-fee for half the amount and given a finding in regard thereto, but this was not made a ground for dispaupering the plaintiff. It is open to the fifth defendant if he is so advised, to prefer a separate petition. I therefore do not propose to deal with the said matter in this Revision Petition.

In the result the Civil Revision Petition is dismissed with costs.

S.V.V. — *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING.

Nanu Nair .. *Petitioner** (*Criminal Petitioner*).

v.

Puthan Veetil Karthiyayini Ammal .. *Respondent* (*Petitioner*).

Nanu Nair v. Karthiyayini Ammal.

Criminal Procedure Code (V of 1898), S. 488—Adoptive child—If entitled to maintenance from adoptive father—Such child if " his legitimate or illegitimate child."

An adoptive father is not liable under S. 488 of the Code of Criminal Procedure to pay maintenance to his adopted child as such child is not " his legitimate or illegitimate child " within the meaning of that section.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Joint Magistrate of Palghat, dated the 4th day of June, 1936, and passed in Miscellaneous Case No. 77 of 1936.

O. K. Nambiar for the Petitioner.

The Public Prosecutor (*L. H. Bewis*) on behalf of the Crown.

The Court delivered the following

JUDGMENT.—The question here is whether an adoptive father is liable under S. 488 of the Code of Criminal Procedure to pay maintenance to his adopted child. There appears to be no direct authority on the point. In *Abdul Rahim* v. *Mst. Amir Begum*[1] however it was held that a step-father is not bound to pay maintenance to his step-son even though apparently before he deserted his wife he had in fact been maintaining the step-son. While sympathising with the point of view taken by the learned Joint Magistrate, I must, I think,

* Cr. R. C. 654 of 1936. 26th February, 1937.
Cr. R. P. 609 of 1936.

1. (1926) I.L.R. 7 Lah. 365.

Nanu Nair v. Karthiyayini Ammal.

look to the strict words of the section—and from them it seems clear that an adopted child does not fall within the phrase "his legitimate or illegitimate child".

The order is accordingly set aside so far as it awards maintenance for the child.

S. V. V. —— *Order set aside.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Ordinary Original Civil Jurisdiction.]

PRESENT:—SIR HORACE OWEN COMPTON BEASLEY, *Kt.*, *Chief Justice*, MR. JUSTICE MOCKETT AND MR. JUSTICE LAKSHMANA RAO.

M. Kanniappa Naicker and Company .. *Petitioner**

v.

The Commissioner of Income-tax, Madras .. *Respondent.*

F.B.

Kanniappa Naicker & Co. v. Commissioner of Income-tax, Madras.

Income-tax Act (XI of 1922), Ss. 26 (2) and 26-A—Two separate firms supplying labour to Port Trust authorities—Termination of their contract on a particular date—Tenders called for by the Port Trust authorities—The two firms agreeing to join under a single name and entering into the contract—Supply of labour under the name of single firm—Whether assessable separately on the ground of succession to the same business as required by S. 26 (2).

Prior to 31st August, 1933, two contractors one called M.L.N. and Sons and another partnership firm M.R.N. and R.G. were supplying labour to the Madras Port Trust under two separate contracts which expired on that date. Till that date, the two firms were separately assessed by the Income-tax authorities. Before the date of expiry of the said contract the Port Trust authorities, contrary to their previous practice, decided to call for tenders for the supply of labour for a period of five years from September, 1933. The two firms decided to tender jointly for that contract in pursuance of an informal agreement between themselves by which it was agreed to have 50 per cent. of the profits and loss to be allotted the M.K.N. & Sons and 25 per cent. each to the two members of the other partnership. They succeeded in getting the contract and accordingly jointly supplied labour under a single name M.K.N. & Company. Subsequently the M.K.N. & Sons applied to the Income-tax Officer for the registration of the firm under S. 26-A of the Act, filing the instrument of partnership. This application was refused on the ground that the instrument of partnership did not specify the shares of the partners in the partnership. The questions that arose for decision for the Full Bench were (1) whether on the facts of the case the assessee firm did succeed to the business of the individual partners within the meaning of S. 26 (2) of the Act, and (2) whether a firm constituted under a registered deed of partnership of which one member is a firm is not entitled to be registered as a firm for the purpose of income-tax merely because while specifying the individual share of the profits and loss the instrument does not specify the shares *inter se* of the partner firm.

---

* O. P. No. 17 of 1936. 18th December, 1936.

F.B.

Kanniappa Naicker & Co. *v.* Commissioner of Income-tax, Madras.

Held, that the individual business carried on by the respective persons should be considered to have terminated on the dates of the expiry of the contract that is 31st of August, 1933. Though they continued to carry on the same trade, that is, supply of labour, still what is required is that the business should be the same business and not business of the same nature to bring it within the meaning of 'succession' to a business as required by S. 26 (2) of the Act. The two businesses of M.K.N. & Sons and R.N. and G.N. came to an end on the 31st August, 1933, and thereafter a new partnership (M. & N. & Son) was started to carry on business of a similar nature.

Messrs. Best & Co. v. *The Commissioner of Income-tax, Madras*, (1932) 63 M.L.J. 15: I.L.R. 55 Mad. 832: 6 I.T.C. 92, distinguished.

(2) That since the individual shares of the partners were not specified as necessary under S. 26-A, the refusal to register the firm was proper.

Case stated by the Commissioner of Income-tax, Madras, was as follows:—

In accordance with the High Court's order quoted above I have the honour to refer the following case for the decision of the Hon'ble the Judges of the High Court under S. 66 (3) of the Indian Income-tax Act (XI of 1922), hereinafter referred to as the Act.

2. The petitioners are a firm constituted under an instrument of partnership dated 21st December, 1934. The partners of the firm are—

(1) M. K. Naicker & Sons—a firm consisting of four partners constituted under an instrument of partnership dated 1st November, 1934, and hereinafter referred to as the partner firm,

(2) M. Raju Naicker, and

(3) R. Govindarajulu Naicker.

They carry on business as suppliers of labour within the jurisdiction of the Income-tax Officer, Madras I Circle.

3. Prior to 1st September, 1933, the three partners of the petitioner firm were supplying labour to the Madras Port Trust under two separate contracts, one by partner No. 1 and the other by partners Nos. 2 and 3 as a firm. Partner No. 1 then represented a Hindu undivided family of which M. K. Naicker was the manager and was carrying on the business of supplying labour and also another business (carting contract) under the trade name "M. K. Naicker & Sons". Partners Nos. 2 and 3 were carrying on the business of supplying labour as a firm. They had no other business. The family represented by M. K. Naicker and the firm consisting of partners Nos. 2 and 3 were assessed separately till 1933-34 (previous year calendar year 1932). The contracts for the supply of labour which the partners had with the Madras Port Trust expired on 31st August, 1933, and thereafter the Port Trust decided to call for tenders for the supply of labour for a period of five years from September, 1933. The three partners of the

petitioner firm tendered jointly for the contract in pursuance of an agreement entered into by them. A translation of the written agreement dated 3rd July, 1933, is filed, marked Ex. A. They succeeded in getting the contract and accordingly continued the same business (supplying labour) which they had been doing individually till then. The firm executed a joint agreement dated 5th September, 1933, with the Port Trust specifying the terms and conditions of the contract. An extract of the preamble and paragraph 28 of the agreement is filed, marked Ex. B. Most of the employees of the businesses prior to September, 1933, were taken over by the firm and the business was carried on in the premises of the partner firm (subsequently changed to separate premises) and under the vilasam " M. K. Naicker & Company ".

4. M. K. Naicker died on 4th October, 1934, and thereafter the joint family which consisted of his four sons became divided. These divided members constituted themselves into a firm under the old family trade name, *viz.*, M. K. Naicker & Sons and executed the deed of partnership dated 1st November, 1934, mentioned in paragraph 2 (1) above. This firm and Raju Naicker and Govindarajulu Naicker, the two other partners who had jointly taken up the contract with the Port Trust, then entered into a fresh partnership evidenced by a deed dated 21st December, 1934, in respect of the contract with the Port Trust for supplying labour. The other business which M. K. Naicker & Sons was carrying on, *viz.*, carting agency, etc., is still continued separately by the firm M. K. Naicker & Sons. From 1st September, 1933, the partners have not been carrying on labour supply business individually.

5. For the assessment of the year 1934-35, M. K. Naicker & Sons partner No. 1 filed a return showing the income of the labour supply business carried on by them during the period 1st January, 1933 to 31st August, 1933, the date on which their independent contract with the Port Trust expired and their income under other heads of the year of account (calendar year 1933). They contended that the labour supply business carried on by them had been discontinued on 31st August, 1933, and therefore claimed the relief provided by S. 25 (3) of the Act. Similarly partners 2 and 3 made returns for the tax year 1934-35, the year of account being the calendar year 1933 showing the income of the period 1st January 1933 to 31st August 1933 (the date of the expiry of their independent contract with the Madras Port Trust). They also contended that their business of supplying labour was discontinued on 31st August, 1933, when their contract with the Port Trust expired and that therefore they were entitled to the relief provided by S. 25 (3) of the Act. The Income-tax Officer held that there was no discontinuance of the business within the meaning of S. 25 (3) of

F.B.

Kanniappa Naicker & Co. *v.* Commissioner of Income-tax, Madras.

the Act but that there was a succession within the meaning of S. 26 of the Act and accordingly held that the petitioner firm was liable to be taxed in respect of the profits earned by its partners, *viz.*, M.K. Naicker & Sons, Raju Naicker and Govindarajulu Naicker. He accordingly required the petitioner firm to make a return of its income for the tax year 1934-35. The firm filed a return declaring a loss amounting to Rs. 6,475-13-7. Since the petitioner firm's contract with the Port Trust commenced only in September, 1933, they wanted "September to August" to be treated as their "previous year" for the purposes of the assessment. The Income-tax Officer allowed this and in accordance with his decision regarding succession mentioned above, he held that for the tax year 1934-35 the petitioner firm was liable to be assessed on the profits of its predecessors for the period 1st January, 1933 to 31st August, 1933. After examining the accounts of the partners of the petitioner firm the Income-tax Officer determined the profits of this period to be Rs. 23,064. There is no dispute now as regards the amount.

6. The petitioners applied to the Income-tax Officer for the registration of their firm "M.K. Naicker & Co.". Under S. 26-A of the Act, in the form prescribed by R. 3 of the Indian Income-tax Rules, 1922 and filed a copy of the instrument of partnership dated 21st December, 1934, under which the firm had been constituted. An extract of the preamble and paragraph 5 of the instrument of partnership is filed marked Ex. C. In the application for registration, the shares of the partners of the firm M. K. Naicker & Sons were separately shown. This was in accordance with the partnership under which that firm had been constituted. But in the deed constituting the petitioner firm the share of the four partners of the partner firm was given jointly. Since the partnership deed under which the petitioner firm had been constituted did not specify the individual shares of the partners the Income-tax Officer refused to register the firm. An extract of his order is filed marked Ex. D.

7. The petitioners appealed to the Assistant Commissioner but without success. An extract of his order is filed, marked Ex. E.

8. The petitioners then filed an application under S. 66 (2) of the Act and required my predecessor to refer to the High Court three questions alleged to be questions of law. I declined to do so on the ground that no questions of law arose for decision. A copy of my order is filed, marked Ex. F.

9. The petitioners then moved the High Court under S. 66 (3) of the Act and in its order dated 13th March, 1936, the High

F.B.

Kanniappa Naicker & Co. *v.* Commissioner of Income-tax, Madras.

Court has directed me to state a case and refer the following two questions:—

(*a*) Whether on the facts of this case the assessee firm did succeed to the business of the individual partners within the meaning of S. 26 (2) of the Indian Income-tax Act?

(*b*) Whether a firm constituted under a registered deed of partnership of which one member is a firm is not entitled to be registered as a firm for the purpose of income-tax merely because while specifying the individual share of the profits and losses the instrument does not specify the shares *inter se* of the partner firm?

Question (*a*).—The facts found are:—

(*a*) The individual partners were separately carrying on the business of supplying labour to the Madras Port Trust until 31st August, 1933.

(*b*) When the Port Trust invited tenders for the supply of labour from 1st September, 1933, the partners of the firm tendered jointly and secured the contract.

(*c*) From 1st September, 1933, the partners continued to carry on the same business (supply of labour to the Port Trust) jointly in accordance with the agreement dated 5th September, 1933.

(*d*) Most of the employees of the old business and the goodwill of the individual partners as suppliers of labour are now used for the joint business of the three partners in the same line. From 1st September, 1933, the individual partners have not been carrying on the business of supplying labour separately either to the Port Trust or to any other person.

I am of the opinion that the facts mentioned above establish that the business now carried on by the assessee firm is identical with the business carried on by the partners individually and that it is in continuation of the individual business of the partners. The effect of the joint contract of the partners with the Port Trust is that their separate businesses become amalgamated into one business. Prior to 1st September, 1933, the business of supplying labour to the Port Trust consisted of two units, one owned by partner No. 1 and the other by partners Nos. 2 and 3. After 1st September, 1933, both the units are owned by the three partners jointly, no one having any exclusive ownership of any one unit. There is thus a transfer of ownership of the separate businesses from the partners concerned to the firm. This, in my opinion, amounts to " succession " within the meaning of S. 26 (2) of the Act. (*Sind Light Railway Co., Ltd.* v. *The Commissioner of Income-tax, Bombay*[1].) The question should be answered in the affirmative.

1. (1932) 6 I.T.C. 271.

F.B.

Kanniappa Naicker & Co. *v.* Commissioner of Income-tax, Madras.

Question (b).—The provisions regarding the registration of firms under the Act are contained in S. 26-A and rr. 2-6 of the Indian Income-tax Rules, 1922. S. 26-A and paragraph 2 of the form of application prescribed by r. 3 require that the individual shares of the partners should be specified in the instrument of partnership which is presented for registration. In this case the partners of the petitioner firm are six in number, four of whom constitute a separate firm governed by a separate instrument of partnership. The share of the partner firm is 7 annas in the rupee. The shares *inter se* of the partners of the partner firm have to be ascertained from another instrument which was not presented along with the application for registration. The section clearly lays down that the share of each individual partner should be specified in the deed of partnership. Since this has not been done in this particular case, registration was rightly refused. The question should be answered in the negative.

G. Ramakrishna Aiyar and *T. Muniswamy Reddi* for Petitioner.

M. Patanjali Sastri, T. K. Sundararaman and *C. S. Rama Rao Saheb* for Respondent.

The Court delivered the following

JUDGMENT.—The questions propounded are:—

"(a) Whether on the facts of this case the assessee firm did succeed to the business of the individual partners within the meaning of S. 26 (2) of the Indian Income-tax Act?" and

"(b) whether a firm constituted under a registered deed of partnership of which one member is a firm is not entitled to be registered as a firm for the purpose of income-tax merely because while specifying the individual share of the profits and losses the instrument does not specify the shares *inter se* of the partner firm."

Prior to the 31st August, 1933, a firm called M.K. Naicker & Sons was supplying labour to the Madras Port Trust under a contract which expired on the 31st August, 1933, and M. Raju Naicker and R. Govindarajulu Naicker in partnership had a similar contract with the Madras Port Trust which also expired on the same date. The labour under the contract was supplied by the former partnership M. K. Naicker & Sons to two godowns belonging to the Madras Port Trust and by the latter partners to two other godowns also belonging to the Madras Port Trust. Until 1933-1934 the family represented by M. K. Naicker & Sons which was an undivided family and the firm

F.B.

Kanniappa Naicker & Co. v. Commissioner of Income-tax, Madras.

consisting of M. Raju Naicker and R. Govindarajulu Naicker were separately assessed. The managing member of the former firm had for many years been supplying labour to the Madras Port Trust under similar contracts. When the before-mentioned contracts were about to expire, the Port Trust, contrary to their previous practice, decided to call for tenders for the supply of labour for a period of five years from September, 1933, the previous practice having been to grant contracts without calling for tenders. M.K. Naicker & Sons and the other partnership decided to tender jointly for this contract in pursuance of an informal agreement entered into between them on 3rd July, 1933, in which it was agreed that if the tender should be accepted by the Port Trust, 50 per cent. of the profits and losses would be allotted to M. K. Naicker & Sons, 25 per cent. to Raju Naicker and 25 per cent. to Govindarajulu Naicker and that an acceptance of the tender a detailed partnership agreement would be executed and registered. These persons succeeded in getting the contract and accordingly jointly supplied labour to the four godowns of the Madras Port Trust which they had previously done individually and on the 21st December, 1934, executed a deed of partnership in respect of a firm styled M.K. Naicker & Co., the present petitioners M. K. Naicker & Sons, consisting of four partners, being called the partners of the first part and Raju Naicker and Govindarajulu Naicker partners of the second and third part respectively, and their shares in the profits and losses were specified as follows: M.K. Naicker & Sons 7 annas in the rupee; Raju Naicker 5 annas in the rupee and Govindarajulu Naicker 4 annas in the rupee. Under the document the partners who are described as three in number agreed to carry on the labour supply to the Madras Port Trust in pursuance of an agreement made by M. K. Naicker & Co., with the latter dated 5th September, 1933. Subsequently M.K. Naicker & Co. applied to the Income-tax Officer for the registration of the firm under S. 26-A of the Act filing the instrument of partnership already referred to dated the 21st December, 1934. This application was refused on the ground that the instrument of partnership did not specify the shares of the partners in the partnership. This point will be dealt with when we come to consider question (*b*) and as regards question (*a*) some further facts must be stated and they are that for the assessment of the year 1934-1935. M. K. Naicker &

F.B.

Kanniappa Naicker & Co. v. Commissioner of Income-tax, Madras.

Sons filed a return showing the income of the labour supply business carried on by them during the period 1st January, 1933 to 31st August, 1933, the date on which their independent contract with the Port Trust expired, contending that the labour supply business carried on by them had been discontinued on 31st August, 1933 and therefore claiming the relief provided by S. 25 (3) of the Act. Raju Naicker and Govindarajulu Naicker made a similar return and claim. The Income-tax Officer held that there was no discontinuance of the business within the meaning of S. 25 (3) of the Act but that there was a "succession" within the meaning of S. 26 (2) of the Act and held that the firm of M. K. Naicker & Co. (the assessees here) was liable to be taxed in respect of the profits earned by M. K. Naicker & Sons and the partnership of Raju Naicker and Govindarajulu Naicker. He accordingly required M. K. Naicker & Co. to make a return of its income for the tax year 1934-1935. The firm filed a return declaring a loss amounting to Rs. 6,475-13-7. Since the assessee firm's contract with the Port Trust commenced only in September, 1933, they required "September to August" to be treated as their "previous" year for the purposes of the assessment. This claim was allowed but the Income-tax Officer held that for the year 1934-1935, M. K. Naicker & Co. was liable to be assessed on the profits of M. K. Naicker & Sons, and the partnership of Raju Naicker and Govindarajulu Naicker for the period January, 1933 and 31st August, 1933 and he determined the profits of this period to be Rs. 23,064.

The facts have been found by the Income-tax Commissioner as follows: (*a*) The individual partners were separately carrying on the business of supplying labour to the Madras Port Trust until 31st August, 1933; (*b*) when the Port Trust invited tenders for the supply of labour from 1st September, 1933, the partners of the firm tendered jointly and secured the contract; (*c*) from 1st September, 1933, the partners continued to carry on the same business (supply of labour to the Port Trust) jointly in accordance with the agreement dated 5th September, 1933; (*d*) most of the employees of the old business and the goodwill of the individual partners as suppliers of labour are now used for the joint business of the three partners in the same line. From 1st September, 1933, the individual partners have not been carrying on the business

F.B.

Kanniappa Naicker & Co. v. Commissioner of Income-tax, Madras.

of supplying labour separately either to the Port Trust or to any other person. The Commissioner is of the opinion that the facts before stated by him establish that the business carried on by M. K. Naicker & Co., is identical with the business carried on by M. K. Naicker & Sons and Raju Naicker and Govindarajulu Naicker individually, that it is in continuation of the individual business of the partners, that the effect of the joint contract of the partners with the Port Trust is that their separate businesses became amalgamated into one business, that prior to 1st September, 1933, the business of supplying labour to the Port Trust consisted of two units, one owned by M. K. Naicker & Sons and the other by Raju Naicker and Govindarajulu Naicker, that after 1st September took these units are owned by M.K. Naicker & Co., no one having any exclusive ownership of any one unit, that there is thus a transfer of ownership of the separate business from the partners concerned to the firm and that this amounts to "succession" within the meaning of S. 26 (2) of the Act; and in support of this opinion he relies upon *Messrs. Best & Co.* v. *Commissioner of Income-tax, Madras.*[1] Taking question (*a*) first, the relevant section is S. 26 (2) of the Act which reads as follows:—

"Where at the time of making assessment under S. 23, it is found that the person carrying on any business, profession or vocation has been succeeded in such capacity by another person, the assessment shall be made, on such person succeeding, as if he had been carrying on the business, profession or vocation throughout the previous year, and as if he had received the whole of the profits for that year".

The requisites of that sub-section, therefore, are that there must be a business in existence prior to the date of an assessment being made and that on the date of the making of the assessment it must be carried on by a different person to the person who carried it on prior to the date of the assessment, that is to say, the business must be the same but the person carrying it on must be different. For the Commissioner of Income-tax, *Bell* v. *National Provincial Bank of England, Ltd.*[2], was relied upon. The question there was whether the respondent Bank which acquired by purchase the business of the County of Stafford Bank succeeded to the business of the latter Bank within the meaning of r. 4 of the 1st and 2nd cases of schedule D, S. 100 of the Income-tax Act of 1842, the material part of which is similar to the sub-section in question

1. (1932) 63 M.L.J. 15: I.L.R. 55 Mad. 832: 6 I.T.C. 92.
2. (1904) 5 T.C. 1.

F.B.

Kanniappa Naicker & Co. v. Commissioner of Income-tax, Madras.

here. On page 10 the Master of the Rolls says:—

"It seems to me that the words of r. 4 are plain, and that if the National Provincial Bank had not existed, but some new company had been formed to take over for the first time the business of the Stafford Bank, there would have been a case directly falling in terms within the words of the 4th Rule: "If any person shall have succeeded to any trade, manufacture, adventure or concern.' In the case I put up a new company formed for the first time and acquiring the Stafford Bank, that would clearly be a case of a person succeeding to a concern. What difference does it make that that person who succeeds to the concern should himself already have an existing business? Does he the less succeed to the new business because he had the old one? It seems to me certainly not. He had the old one before. He has the old one still and the new one in addition and to that new one, it seems to me, he has succeeded."

It was accordingly held that there had been a succession within the meaning of the 4th Rule. There, there was a definite existing business, namely, the respondent Bank. There was also a definite and distinct business, the Stafford Bank. The former Bank became the owners by purchase of the latter. Therefore, the business of the latter was at the date of the assessment being carried on by a different body, namely, the Respondent Bank and, as the Master of the Rolls put it, it had clearly succeeded to that business. The present case, in our opinion, is distinguishable from *Bell* v. *National Provincial Bank of England, Ltd.*[1], for the following reason, namely, that at the time of the purchase of the Stafford Bank it was an existing business which could and probably would have been continued under the same ownership for years. Here, the facts are entirely different and for this purpose the nature of the businesses which were going on prior to the date of the assessment in question here must be examined. Those businesses were to supply cooly labour to certain godowns belonging to the Madras Port Trust and were being conducted under contracts of specified durations. There is nothing to show that on the termination of any contract the next contract was bound to go to either of the firms carrying on these businesses which it is important to note existed solely for the purposes of those contracts, because it is not suggested that either of the partnerships carried on any other businesses in connection with the supply of labour except that M. K. Naicker & Sons had a small contract business. In our view, these businesses must be held to have terminated on the dates of the expiry of each contract, that is to say, the business of M. K.

1. (1904) 5 T.C. 1.

F.B.

Kanniappa Naicker & Co. *v.* Commissioner of Income-tax, Madras.

Naicker & Sons terminated on the 31st August, 1933, and that of Raju Naicker and Govindarajulu Naicker on the same date. Reference was made by the Commissioner of Income-tax to the goodwill of these firms but we were unable to get from Mr. Patanjali Sastri any helpful reply in answer to questions put by us as to what could possibly be the goodwill attaching to such businesses. Unlike the case of the Stafford Bank, there was nothing which either of these partnerships could sell to any one for example in August, 1933, or to take an earlier date July when these two entities informally agreed to make a joint tender for the contract in question. They had no contract lasting beyond 31st August, 1933, to sell, even supposing the Madras Port Trust would permit them to do so. It is conceded also that M.K. Naicker & Co. did not take over any of the assets or liabilities of the businesses carried on by M. K. Naicker & Sons and Raju Naicker and Govindarajulu Naicker. Whereas in *Bell* v. *National Provincial Bank of England, Ltd.*[1], the latter took over Stafford Bank's existing business and its clients and also its premises. The Income-tax Officer's main reason for the assessment is that these persons had for several years possessed the monopoly of supplying labour to the Port Trust and finding that their monopoly was about to come to an end owing to the adoption by the Port Trust of the policy of inviting tenders and in order to secure continuity for their business they entered into a partnership and put in their tender for the contract and as they were successful they found themselves in a position to continue the business without a break. It is quite correct that they continued to supply labour to the godowns of the Madras Port Trust as before and that what they did after 31st August, 1933, was the business of the same nature as before. But in our view what the section requires is that it should be the same business and not business of the same nature and we think that this is the mistake which has been made by the Commissioner of Income-tax when he finds that "the partners continued to carry on the same business (supply of labour to the Port Trust)". This is not a case like *Messrs. Best & Co.* v. *Commissioner of Income-tax, Madras*[2]. There Best & Co. were carrying on a number of businesses in their own name and as proprietors of concerns under different names. Amongst the latter was the Eagle Rolling Mills. This

1. (1904) 5 T.C. 1.
2. (1932) 63 M.L.J. 15: I.L.R. 55 Mad. 832: 6 I.T.C. 92.

F.B.

Kanniappa Naicker & Co. *v.* Commissioner of Income-tax, Madras.

business they sold to a new company floated for acquiring it as a going concern and it was held that the new company had succeeded Best & Co., within the meaning of S. 26 (2) of the Act. That was a plain case of an existing company being purchased by another as in *Bell* v. *National Provincial Bank of England, Ltd.*[1]. In our view, the two businesses of M. K. Naicker & Sons and Raju Naicker and Govindarajulu Naicker came to an end on the 31st August, 1933, and thereafter a new partnership (M.K. Naicker & Co.) was started to carry on a business of a similar nature. There was therefore no 'succession" to a business as is required by S. 26 (2) of the Act.

There remains question (*b*) to be considered. The procedure relating to registration of firms is laid down in S. 26-A of the Act which is as follows:—

(1) Application may be made to the Income-tax Officer on behalf of any firm, constituted under an instrument of partnership specifying the individual shares of the partners, for registration for the purposes of this Act and of any other enactment for the time being in force relating to income-tax or super-tax.

(2) The application shall be made by such person or persons and at such times and shall contain such particulars and shall be in such forms, and be verified in such manner, as may be prescribed; and it shall be dealt with by the Income-tax Officer in such manner as may be prescribed.

It is the former sub-section that is in question here. The application was refused on the ground that the individual shares of the partners were not specified in the instrument of partnership. The instrument of partnership as has already been stated treats the partnership of M.K. Naicker & Sons which was made up of four partners as one of the three partners in the firm of M. K. Naicker & Co., and to this partnership a 7 annas share in the rupee in the profits and losses is given. The contention of Income-tax authorities is that as M. K. Naicker & Sons consists of four partners, the shares of each of them should have been set out in the partnership deed (Ex. C). The shares of the partners in M. K. Naicker & Sons were each Re. 0-1-9 totalling 7 annas and as that partnership had previously been registered, a reference to the instrument relating to it, a copy of which was filed with

1. (1904) 5 T.C. 1.

F.B.

Kanniappa Naicker & Co. v. Commissioner of Income-tax, Madras.

the Income-tax authorities, would show this. Not only would the Income-tax authorities be aware of what the shares of the partners were—and it is conceded that they did not know—but the application for registration itself set out the individual shares of the partners of M.K. Naicker & Sons. Notwithstanding this knowledge the Income-tax Officer—and his action has been upheld by the Commissioner—presumably took the view that he was rigidly bound by the words of the section and that as in the instrument of partnership these individual shares were not given, registration must be refused. The object in requiring this information is in order that the Income-tax authorities may determine what the profit received by each of the partners from the partnership profits is and in order to prevent the profits from being distributed to the partners otherwise than in accordance with the shares of the partners as shown in the instrument of partnership registered under the Act and to prevent any partner returning his income below its real amount. We think that this is a hard case in view of the fact that the Income-tax authorities were really aware of the shares of the partners; but the words of the sub-section do not seem to us to permit of any elasticity of construction. S. 28 (2) also points to the same conclusion. The individual shares of the partners must be specified in the instrument of partnership. They were not. That being so, the Income-tax Officer could refuse registration on that ground. The answer to this question, therefore, must be in the negative.

As regards cost, as the main contention has been upon question (*a*) and the assessees have succeeded, in our opinion they are entitled to the costs which we fix at Rs. 250. The Rs. 100 deposited by the assessees is ordered to be refunded to them.

K. C. *Questions answered in the negative.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VARADACHARIAR AND MR. JUSTICE HORWILL.

Kotta Venkataraju Garu .. *Appellant** (*Petitioner in C. M.P. No. 2476 of 1936 on the file of the High Court —Appellant in S. A. No. 848 of 1932—6th Defendant*)

v.

Sri Rajah Sahib Meharban-I-Dostan Sri Raja Ravu Kumara Mahipathi Surya Rao Bahadur Garu, Sirdar, Rajahmundry Sirkar and Maharajah of Pithapuram, and others .. *Respondents* (*Respondents in do.—Plaintiff and Defendants 1 to 5*).

Venkataraju Garu *v.* Maharajah of Pithapuram.

Practice and procedure—Civil Procedure Code, O. 9, r. 13—Dismissal for default—Counsel engaged in another Court—Application to restore—Consideration in dealing with such an application—Courses open to members of the bar.

Where when an appeal was called on for hearing the advocate for the appellant was absent being engaged in another Court and the appellate Court consequently dismissed the appeal for default, and an application was thereupon put in to restore the appeal.

Held, that in dealing with applications of this kind, the Court has to consider the position of the party concerned rather than the conduct of the members of the bar, though it may sometimes be difficult to disassociate the one from the other. The Court has to see if there has been something equivalent to misconduct or gross negligence on the part of the party or of his counsel or something which cannot be set right by his being ordered to pay costs; more so when it is an appeal before the High Court where it sometimes happens that the party is not present here at all, having entrusted his case to counsel.

Observations of Jai Lal, J., in *Abdul Aziz* v. *The Punjab National Bank, Ltd.*, (1928) I.L.R. 10 Lah. 570, approved.

Appeal under cl. 15 of the Letters Patent against the order of the Honourable Mr. Justice Cornish dated 14th August, 1936, and made in C.M.P. No. 2676 of 1936 petition for setting aside the order of dismissal for default, and to restore S. A. No. 848 of 1932 preferred to the High Court

---

*L. P. A. No. 89 of 1936. 10th November, 1936.

Venkataraju Garu v. Maharajah of Pithapuram.

against the decree of the District Court, East Godavari at Rajahmundry in A.S. No. 81 of 1930 (Land Suit No. 2 of 1930 on the file of the Court of the Deputy Collector's Court of Cocanada, Head Quarters Division).

V. Suryanarayana for Appellant.

The Advocate-General (Sir A. Krishnaswami Aiyar) and *K. Subramanian* for Respondents.

The judgment of the Court was delivered by

Varadachariar, J.

Varadachariar, J.—This Letters Patent Appeal has been preferred against an order of Cornish, J., refusing to restore S.A. No. 848 of 1932 which was dismissed under O. 41, r. 17, Civil Procedure Code, as the appellant's counsel did not appear when the case was called. In support of the application, a verified petition has been filed by the counsel engaged in the case and it is there stated that at the time the second appeal came on before our learned brother, the counsel was actually engaged in arguing a case before another division bench, that he did not make other arrangements for the second appeal because he expected the case before the division bench to be over earlier but that to meet all contingencies he had asked a representation to be made to our learned brother if the case should be reached earlier, that he was actually engaged before another bench and that he would be before Cornish, J., in a few minutes.

When the matter came on before us on a previous occasion, a question had been raised by the office whether the appeal was competent without leave granted by the learned Judge himself. Mr. Suryanarayana maintained that as this was not an order relating to the appellate decree itself no leave was necessary under the terms of cl. 15 of the Letters Patent. But as the point was not free from doubt, we preferred to allow the case to stand over to enable Mr. Suryanarayana to apply to Cornish, J., himself for leave. Leave has since been obtained.

We think it proper to refer here to the observations made by the learned Judge at the time that he granted leave because these observations make it clear that while it might be true that Mr. Suryanarayana had made proper arrangements for his difficulty being represented to the learned Judge, there was some mistake in carrying out these instructions so that the learned Judge was not properly informed of the exact situation. His observations leave little doubt in our mind that if only the

Venkataraju Garu v. Maharajah of Pithapuram.

Varadachariar, J.

matter had been properly placed before the learned Judge, this unfortunate situation would not have arisen.

The application was not opposed even before the learned Judge; and before us it has been very fairly stated on behalf of the respondents that they do not oppose the appeal. In these circumstances, we have less difficulty in dealing with the matter than we should otherwise have. We would only point out that in dealing with applications of this kind, the Court has to consider the position of the party concerned rather than the conduct of the members of the bar, though it may sometimes be difficult to disassociate the one from the other. As regards the position of the party, it was observed in *Arunachala Aiyar* v. *Subbaramiah*[1] that a litigant should not be deprived of hearing unless there has been something equivalent to misconduct or gross negligence on his part or something which cannot be set right by his being ordered to pay costs: Where the non-appearance is due to the default of the counsel engaged in the case, a similar consideration will *mutatis mutandis* be applicable, when the Court has to decide whether there was sufficient cause for the non-appearance of the party or of his counsel. This consideration is all the more weighty when dealing with cases of default in appearance before *this* Court, because it may sometimes happen that the party is not present here at all, having entrusted his case to counsel here (cf. *Raja Ajai Verma* v. *Baldeo Prasad*[2]). It will be unmerited hardship if the party's interests should be irreparably prejudiced by reason of every default on the part of counsel.

From the point of view of the duty of the members of the bar, we have no doubt that every endeavour will be made to maintain and if possible improve upon the traditions of cordiality between the bench and the bar and that no endeavour will be lacking on the part of the members of the bar to facilitate the disposal of work before the Court as far as possible. In this view we strongly commend to the profession the remarks made by Cornish, J., in his note.* It is difficult to

1. (1922) 43 M.L.J. 632: I.L.R. 46 Mad. 60.
2. (1929) I.L.R. 52 All. 536.

* IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE CORNISH.

In view of the difficulty suggested by Varadachariar and Horwill, JJ., I give leave to appeal. But I think it right that I should formally state my reasons in writing which I stated orally, for my refusal to allow the C. M. P.

Venkataraju Garu *v.* Maharajah of Pithapuram.

Varadachariar, J.

lay down any general rule as to what will constitute "sufficient cause" for non-appearance in cases of default of appearance by counsel engaged in a case. The observations of Jai Lal, J., in *Abdul Aziz* v. *The Punjab National Bank, Ltd.*[1], seem to us, if we may say so, to lay down a safe guide in matters of this kind. With these remarks we allow the appeal and direct the restoration of second appeal No. 848 of 1932. There will be no order as to costs either in the Letters Patent Appeal or in the application before Cornish, J.

S. V. V. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE MOCKETT.

Bommi Reddi Muni Reddi .. *Appellant** (*Applicant-Judgment-debtor*)

v.

Perur Subbiah .. *Respondent* (*Respondent-Decree-holder*).

Bommi Reddi Muni Reddi *v.* Subbiah.

Registration Act (XVI of 1908), Ss. 74 and 75 (4)—Enquiry by Registrar regarding execution of a document—Direction as to costs—Execution to conform to Civil Procedure Code, O: 21.

Sub-S. (4) of S. 75 of the Registration Act expressly empowers a Registrar to send his order for costs for execution exactly as if they had been awarded in a suit, and the method of their recovery is to be in accordance with the Code of Civil Procedure, that is to say, under the provisions of O. 21 of the Code.

Appeal against the order of the District Court of Cuddappah dated the 19th day of April, 1934 and made in A. S. No. 97 of 1933 preferred against the order of the Court of the District Munsif of Proddatur dated 11th April, 1933 and made in E.A. No. 295 of 1933 in E.P. No. 167 of 1933 in Cuddappah-Chittoor Application No. 2 of 1930 on the file of the District Registrar of Cuddappah-Chittoor.

The case was posted third in the list after a part heard and some applications to excuse delay. When it was called on nobody was present on behalf of the appellant. After some delay, during which the advocate was sent for, a clerk came and said that the advocate was engaged in another Court. I pointed out in dismissing the C.M.P. that the advocate so placed could have done one of three things: he might have got some friend to inform the judge when he came into Court of his difficulty and asked for the case to be passed over; or he might have come to the judge in his room; or he might have written a note to the judge. * * * * * Rest omitted as unnecessary for the report.

1. (1929) I.L.R. 10 Lah. 570 at 578 and 579.

*A. A. A. O. No. 145 of 1934. 5th February, 1937.

Bommi Reddi Muni Reddi *v.* Subbiah.

T. K. Srinivasathathachariar for Appellant.

S. Kothandarama Nainar for *Ch. Raghava Rao* for Respondent.

The Court delivered the following

JUDGMENT.—The only question here is whether, under S. 75, sub-S. (4), of the Indian Registration Act, an order of the Registrar made under that section can be executed by a District Munsif. The District Registrar of Cuddappah held an enquiry under S. 74 and made an award of Rs. 329-14-0 as costs against the respondent, which he sent to the District Munsiff's Court of Proddatur for execution. The District Munsiff held that he had no power to execute it, and that order was reversed on appeal by the learned District Judge of Cuddappah against whose order this appeal has been filed.

S. 75, sub-S. (4) is as follows:

"The Registrar may, for the purpose of any enquiry under S. 74, summon and enforce the attendance of witnesses and compel them to give evidence, as if he were a Civil Court, and he may also direct by whom the whole or any part of the costs of any such enquiry shall be recoverable as if they had been awarded in a suit under the Code of Civil Procedure, 1908".

Now that sub-section presumes that the Registrar is not a Civil Court. This High Court in two decisions *Manavala Goundan* v. *Kumarappa Reddy*[1] and *Naganna* v. *Pattabhiramayya*[2], has already held that his proceedings are not open to revision under S. 115, Civil Procedure Code. But I consider the meaning of the latter part of the sub-section to be that, although he is not a Civil Court, yet any costs ordered by him can be recovered as if he were a Civil Court and as if those costs had been awarded in a suit under the Code of Civil Procedure. Otherwise a Registrar's order as to costs is futile as I can find no other machinery for their recovery outside S. 75 of the Indian Registration Act. G. O. No. 1597 dated the 8th of July 1879 has been quoted to me, which purports to empower a Registrar to imprison persons for non-payment of costs decreed by him; but that does not decide this matter. In any case the same Government order states as an axiom what is now a matter for decision, namely, that an order for costs can be executed through a Civil Court in the

---

1. (1907) 17 M.L.J. 313: I.L.R. 30 Mad. 326.
2. (1927) 54 M.L.J. 595: I.L.R. 51 Mad. 245.

Bommi Reddi Muni Reddi *v.* Subbiah.

ordinary way. I prefer to place my decision on what I consider to be clear words of sub-S. (4) which, in the view I take, expressly empowers a Registrar to send his order for costs for execution exactly as if they had been awarded in a suit, and the method of their recovery is to be in accordance with the Code of Civil Procedure, that is to say, under the provisions of O. 21, etc. It is surprising that this matter has never come up for formal decision before.

The appeal will be dismissed with costs.

K. C. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VARADACHARIAR AND MR. JUSTICE KING.

A. Subramania Aiyar .. *Petitioner* (Petitioner)*

v.

S. Meenakshisundaram Chettiar and another .. *Respondents (Respondents).*

Subra-mania Aiyar *v.* Meenakshi-sundaram Chettiar.

Provincial Insolvency Act (V of 1920), S. 28, cl. (7) and S. 34, cl. (2)—'When he is adjudged an insolvent' in S. 34, cl. (2)—Material date—If date of petition or date of adjudication—Effect of relation back of order of adjudication.

A debt that could have been enforced in a court of law on the date of the *presentation* of the insolvency petition but in respect of which the remedy *by suit* had become barred by limitation before the date of the order of adjudication is a debt which could be proved under the Insolvency Act and can be admitted by the Official Receiver in the schedule. In view of the provision in S. 28 (7) of the Provincial Insolvency Act as to 'relation back' the criterion or material date for purposes of S. 34, cl. (2) is 'the date of the filing of the petition."

Nizam v. *Babu Ram*, (1933) I.L.R. 14 Lah. 730 and *Byramji Bomanji* v. *Official Assignee Bombay*, A.I.R. 1936 Bom. 130, followed.

Petition under S. 75 (1) of Act V of 1920 praying the High Court to revise the order of the District Court of Tinnevelly dated 14th February, 1935 and made in C. M. A. No. 28 of 1933, preferred against the order of the Court of the Additional Subordinate Judge of Tinnevelly dated 14th March, 1933 and made in I.A. No. 209 of 1932 (in I. P. No. 14 of 1928 Sub-Court, Tinnevelly).

T. Krishnaswamy Aiyangar and *S. K. Narasimhachari* for Petitioner.

N. Rajagopala Aiyangar and *S. Tyagarajan* for Respondents.

---

* C. R. P. No. 1097 of 1935. 5th February, 1937.

Subramania Aiyar *v.* Meenakshisundaram Chettiar.

Varadachariar, J.

The judgment of the Court was delivered by

Varadachariar, J.—This Civil Revision Petition (under S. 75 of the Provincial Insolvency Act) arises out of an application praying that the respondents' debts which were admitted by the Official Receiver may be expunged from the schedule. The matter has been dealt with in the courts below on the assumption that the respondents' claim could have been enforced in a court of law on the date of the *presentation* of the insolvency petition but that the remedy *by suit* had become barred by limitation before the date of the order of adjudication. The case has been argued before us on the same assumption.

S. 34 (2) of Act V of 1920 provides that all debts to which the insolvent is subject *when he is adjudged an insolvent* (etc.) shall be debts provable under the Act. The Courts below have upheld the respondents' contention that in view of the provision in S. 28 (7) as to 'relation back' the "criterion date was the date of the filing of the petition"; in support of the conclusion, they have relied on *Venkata Hanumantha Rao* v. *Gangayya*[1], where it was held that a petition duly filed by a creditor might under S. 16 be allowed to be *continued* by another creditor whose claim might (if a suit were necessary) have become barred between the date of the presentation of the insolvency petition and the date of the substitution. The trial court further relied on the use of the expression "the commencement of the insolvency" in the course of the judgment in *Sivasubramania* v. *Theethiappa*[2]. The latter case is clearly distinguishable; but as regards the former case, it cannot be denied that the reasoning on which the decision has been based affords support to the respondent's contention, though it is perhaps possible to justify the decision on a different ground, *viz.*, that the petition filed by a creditor must be regarded as a kind of *representative* proceeding and that the other creditors are in a sense parties thereto even from the outset.

There are two decisions directly in point, one of the Lahore High Court, under the Provincial Insolvency Act (*Nizam* v. *Babu Ram*[3]) and the other of the Bombay High

---

1. (1928) 55 M.L.J. 168: I.L.R. 51 Mad. 594.
2. (1923) 45 M.L.J. 166: I.L.R. 47 Mad. 120.
3. (1933) I.L.R. 14 Lah. 730.

Subra-
mania Aiyar
v.
Meenakshi-
sundaram
Chettiar.

Varada-
chariar, J.

Court, under the Presidency Towns Insolvency Act (*Byramji Bomanji* v. *Official Assignee, Bombay*[1]) ; and they support the conclusion arrived at by the Courts below. In *Sankaranarayana Aiyar* v. *Alagiri Aiyar*[2] and *Rangiah* v. *Appaji Rao*[3], there are observations to the effect that on the ground of principle, if not also as a matter of construction, the relation-back doctrine must be held to govern the interpretation of the expression 'order of adjudication' occurring in some of the later sections of the Act. In *Atchuta Ramayya Garu* v. *Official Receiver, East Godavari*[4], both the learned Judges expressed the opinion that the restriction imposed by cl. (2) of S. 28 on the institution of suits by creditors must in view of S. 28 (7) be held to relate back to the date of the presentation of the petition; and if this were the correct view, it would only be logical to hold that even for purposes of S. 34 (2), the same is the material date (cf. *Harrison* v. *Kirk*[5]).

Having heard the point fully argued we think it right to say that if the matter were *res integra*, we should have hesitated o come to the conclusion reached or suggested in the cases above referred to. The scheme of the English Bankruptcy Law since 1883 is to regard the date of the receiving order as the material date for questions like the present and to dissociate them from questions relating to the vesting of the title in the trustee (which only follows on adjudication) and from the doctrine as to 'relation back' whose purpose and effect were explained by the Master of the Rolls in *Pollitt*, In re[6]. The observations in some of the earlier English decisions (which have been quoted in the later cases) must, it seems to us, be understood with due regard to the state of the law when those cases were decided. The Provincial Insolvency Act however has not wholly followed the scheme of the English Act of 1883; not only has it not introduced the intermediate stage of a 'receiving order' but it has departed from modern English practice in fixing the date of the presentation of the Insolvency petition as the material date for most purposes. In the notes appended to the Bill of 1905, it was stated that this was considered to be 'in accordance with the law in force in

1. A.I.R. 1936 Bom. 130.
2. (1918) 35 M.L.J. 296.
3. (1926) 51 M.L.J. 719: I.L.R. 50 Mad. 300.
4. (1935) 69 M.L.J. 241: I.L.R. 58 Mad. 1032.
5. (1904) A.C. 1 at 5.
6. (1893) 1 Q.B. 455 at 457.

Subramania Aiyar v. Meenakshisundaram Chettiar.

Varadachariar, J.

the Presidency Towns' (11 and 12 Vic., c. 21). Further, the Act provides for the relation back, not of the trustee's title or of the commencement of the insolvency but, of the *order* of the court. It is therefore not possible to say with confidence how far the legislature in this country intended to dissociate or has in the result dissociated questions like the one now before us from the doctrine of 'relation back' in the sense in which it has been introduced by the Act.

In a matter where certainty and uniformity of practice is more important than theoretical unassailability, we do not feel justified in dissenting from the view which has been expressed or assumed in the several cases above referred to, in several provinces. Presumably creditors must for many years have acted on the view thus sanctioned and it seems reasonable to leave it to the legislature to alter it, if necessary. On this ground we dismiss this Revision Petition, but without costs.

S. V. V. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATARAMANA RAO.

Kuppu Govinda Chettiar .. *Petitioner* (Plaintiff)*

v.

Uttukottai Co-operative Society by its Liquidator .. *Respondent (Defendant).*

Govinda Chettiar v. Uttukottai Co-operative Society.

Court-Fees Act (VII of 1870 as amended in Madras), S. 7 (iv-a) and Sch. II, Art. 17-A—Decree for money—Order of liquidator under S. 42 (b) of the Co-operative Societies Act (II of 1912)—Suit to declare order to be null and void—Court-fee payable—Provisions of Court-Fees Act—Construction in favour of subject.

The plaintiff sued for a declaration that an order of a liquidator of a co-operative society determining the amount of contribution payable by the plaintiff under S. 42 (*b*) of the Co-operative Societies Act of 1912 was null and void. The case of the plaintiff was that he ceased to be a member of the co-operative society on or about a certain date, that more than two years after he ceased to be a member an order for contribution was made against him and that the liquidator had no jurisdiction to pass such an order. He prayed for a decree that such an order was illegal, void and of no effect and unenforceable against him.

Held, that the order of the liquidator under S. 42 (*b*) of the Co-operative Societies Act was not a 'decree for money' within the meaning of S. 7 (iv-A) and that the plaint was leviable to court-fee as for a mere declaration under Art. 17-A of Schedule II of the Court-Fees Act as amended in Madras.

* C. R. P. Nos. 692 and 693 of 1936. 29th January, 1937.

Govinda Chettiar *v.* Uttukottai Co-operative Society.

A subject cannot be taxed unless he comes within the letter of the law, and in case of reasonable doubt the construction most beneficial to the subject is to be adopted.

Petitions under S. 115 of Act V of 1908 and S. 107 of the Government of India Act, praying the High Court to revise the orders of the District Court of Chingleput in O. S. Nos. 1 and 12 of 1935 respectively.

V. Ramaswami Aiyar and *N. G. Krishna Aiyangar* for Petitioner.

K. S. Champakesa Aiyangar for Respondent.

The Court delivered the following

JUDGMENT.—The question raised in this Revision Petition relates to the amount of the court-fee leviable on a plaint which prays for a declaration that an order of a liquidator of a co-operative society determining the amount of contribution payable by the plaintiff under S. 42 (*b*) of the Co-operative Societies Act is null and void. The case of the plaintiff is that he ceased to be a member in or about June, 1930, that more than two years after he ceased to be a member an order for contribution was made against him on the 25th November, 1933, directing him to pay a large sum, namely, Rs. 8,000 and that the liquidator had no jurisdiction to pass such an order and he therefore prayed for a decree that such an order is 'illegal, void and of no effect and unenforceable against the plaintiff'. He paid a court-fee of Rs. 100 under Art. 17-A (iii) of Sch. II to the Madras Court-Fees Amending Act. The learned District Judge held that the plaintiff should have valued the claim under S. 7 (iv-A) of the said Amending Act. This order of the learned Judge is canvassed as being unsound by Mr. V. Ramaswami Aiyar for the plaintiff. The question is, is the order of the liquidator a decree for money within the meaning of the said S. 7 (iv-A)? The term 'decree' therein connotes a final order of a Court, whether civil or revenue, in a suit, and an order passed by an officer or a body which is not a Court but is invested with judicial powers in pursuance of which a liability is fixed on a person to pay a sum of money will not come within its purview. The Co-operative Society Act itself draws a distinction between an order and a decree. S. 42 (5) of the Act says that orders made under the said section, when made by a liquidator, shall be enforced by any Civil Court in the same manner as a decree of such Court. In construing an analogous provision, S. 15 of the Indian Arbitra-

Govinda Chettiar v. Uttukottai Co-operative Society.

tion Act, which provides that an award shall be enforceable as if it were a decree of Court, Viscount Cave observed thus:

"S. 15 does not enact that an award when filed is to be deemed a decree of the Court but only that it is to be enforceable as if it were a decree".

Sassoon & Co. v. *Ramdutt Ramkissen Dass*[1] and refused to apply the bar of S. 47, Civil Procedure Code, to a suit to have an award declared null and void.

Thus applying, the said principle, from the Co-operative Societies Act itself it is abundantly clear that the order of the liquidator under S. 42 (*b*) cannot be a decree for money within the meaning of S. 7 (iv-A), not having been passed by any Court in a suit. A subject cannot be taxed unless he comes within the letter of the law and in case of reasonable doubt, a construction most beneficial to the subject is to be adopted. I am therefore of the opinion that S. 7 (iv-A) would not apply to the case and that the court-fee paid is proper. I accordingly set aside the order of the learned District Judge and allow the Revision Petition.

C. R. P. No. 693 of 1936:—Following my judgment in C. R. P. No. 692 of 1936, I set aside the order of the learned District Judge and allow the Revision Petition.

K. C. ——— *Petitions allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

The Dharapuram Janopakara Nidhi, Ltd., by its present Secretary A. Adisesha Ayyar .. *Appellant** (*Plaintiff*)

v.

K. Lakshminarayana Chettiar .. *Respondent* (*Defendant*).

The Dharapuram Janopakara Nidhi, Ltd. v. Lakshminarayana Chettiar.

Civil Procedure Code (V of 1908), O. 21, r. 58—Claim petition against an attachment—Dismissal of—Failure to file suit under O. 21, r. 63—Attachment raised subsequently but more than a year after the rejection of claim—Claimant continuing in possession—Claimant found to be in possession from before claim petition—Adverse possession if interrupted by the claim order—Subsequent possession for over 12 years—If necessary to prove fresh entry into possession or 12 years possession from after date of the raising of attachment.

1. (1922) 44 M.L.J. 758: L.R. 49 I.A. 366: I.L.R. 50 Cal. 1 at 9 (P.C.).

* S. A. No. 1163 of 1934. 2nd September, 1936.

The Dharapuram Janopakara Nidhi, Ltd. *v.* Lakshminarayana Chettiar.

The fact that a claim put in by the defendant against an attachment was rejected and no suit was filed under O. 21, r. 63 to set aside that order does not preclude the defeated claimant from contending that he was in adverse possession from before the date of the claim petition, when the attachment objected to his subsequently been raised, though it was raised more than one year after the rejection of the claim. The attachment ceases to be effective after it is raised even from the date of the attachment itself and the defeated claimant has the same right to put forward his earlier claims as he had at the time of filing his claim petition.

Even if it be assumed that by operation of law there is a legal break in the adverse possession on the date of the claim order the claimant can rely on his subsequent possession for over the statutory period from the date of the order, as at the most its effect can be only to create a break and not to oust the claimant from possession. It is not necessary to prove that he got into possession again after that date or that he has been in possession for over 12 years from the date when the attachment was raised.

Appeal against the decree of the Court of the Additional Subordinate Judge of Coimbatore in A. S. No. 32 of 1934 preferred against the decree of the Court of the District Munsiff of Dharapuram in O. S. No. 601 of 1931.

K. V. Krishnaswami Ayyar for *T. M. Krishnaswamy Ayyar* and *S. S. Ramachandra Ayyar* for Appellant.

V. V. Srinivasa Aiyangar and *V. V. Ramadurai* for Respondent.

The Court delivered the following

JUDGMENT:—The finding of the lower Courts is that this property has been enjoyed adversely by the defendant from a time prior to 9th July, 1917, and that he has therefore perfected a title to the property by adverse possession. In S. A., it is contended that, by operation of law, possession was interrupted on 9th July, 1917.

The learned Advocate for the appellant has emphasised that when a symbolical delivery is given or where a Boundary Officer determines a Boundary and an application is not made to a Civil Court within a year, adverse possession is deemed by law to have been broken. By analogy, he contends that where a Court dismisses a claim petition it is not open to the defeated claimant to contend that he was in possession on the date of his claim petition. The effect of a symbolical delivery or a decision of a survey officer is clearly different from that resulting from a mere order of Court. In the case of a symbolical delivery, an amin actually goes to the disputed property and openly declares that a symbolical delivery is given, and the person in possession and other interested parties

The Dharapuram Janopakara Nidhi, Ltd. *v.* Lakshminarayana Chettiar.

are informed by proclamation and otherwise that henceforth a certain person is entitled to the legal possession of that property. A somewhat similar procedure is adopted under the Surveys and Boundaries Act. The learned Advocate for the appellant has referred me to *Velayuthan* v. *Laksmana*[1] and *Aisamma* v. *Moideen*[2] in support of his contention. In *Velayuthan* v. *Laksmana*[1] there was an actual adjudication under O. 21, r. 60 or its equivalent under the old Code, and the Judges held that as the aggrieved party had not filed a suit, it was not open to him to contend subsequently either that he had title to the property or had been in possession. This case was quoted with approval in *Aisamma* v. *Moideen*[2] where the question was however different, in that the application was dismissed under the proviso of O. 21, r. 58 because the application was unnecessarily delayed. There was therefore no adjudication on the question of possession, and it is difficult to follow why the claimant whose petition was dismissed had by implication an adverse finding on the question of possession. Although *Velayuthan* v. *Laksmana*[1] was followed with approval, it was not discussed and the difference between the two cases was apparently not noticed.

Mr. V. V. Srinivasa Ayyangar on behalf of the respondent has two sound answers to the arguments adduced on behalf of the appellant which make it unnecessary for him to canvass the correctness of *Velayuthan* v. *Laksmana*[1] and *Aisamma* v. *Moideen*[2]. The first is that as the sale was not completed and the attachment was subsequently raised, any adverse finding on the claim petition became inoperative, and that the mere fact that a suit was not filed within a year did not disentitle him to raise the same contentions with regard to title and possession in subsequent proceedings. If the attachment had been raised within a year, then obviously no suit would have been necessary; for the unsuccessful claimant would have got what he wanted without the necessity of filing a suit. The question that arose in *Kumara Goundan* v. *Thevaraya Reddi*[3] was whether the fact that the attachment was raised beyond a year made any difference. Ramesam, J.,

1. (1885) I.L.R. 8 Mad. 506.
2. (1923) 45 M.L.J. 690: I.L.R. 47 Mad. 160.
3. (1924) 48 M.L.J. 616.

The Dharapuram Janopakara Nidhi, Ltd. *v.* Lakshminarayana Chettiar.

says:

"The only difference that I can see between the two cases (the raising of the attachment within one year and the raising beyond one year) is that in the former case the unsuccessful claimant who waits incurs no risk, as he knows for certain within one year that the attachment in execution of it has ceased to exist; and in the latter, he takes a risk by not suing, as he cannot be certain that the attachment will be raised. But I do not see why, when the event on which he takes his chance, *viz.*, the cessation of the attachment by the payment of the decree, or for other reason, happens, he should not take advantage of it simply because he took risks in so waiting".

Two later cases *Chet Singh* v. *Gujar Singh*[1] and *Bamapada* v. *Ramnath Mandal*[2] have also been cited. In the head note to *Chet Singh* v. *Gujar Singh*[1] we find:

"The order under O. 21, r. 63 is conclusive in the sense that it cannot be agitated again in the execution proceedings in which it was passed unless a suit is brought within one year of the date of the order, *i.e.*, that it is conclusive as between the claimant and the decree-holder who is proceeding against property. If however the decree-holder raises the attachment within a year, obviously there is no reason why the claimant should institute a suit to set aside the order as there is no attachment in force. It makes no difference if the attachment is raised after the termination of one year. It does mean that in those proceedings the claimant is running a risk and will be estopped from contesting the decree-holder's right to proceed against the property; but if the decree-holder does not sell the property and the decree is satisfied otherwise, the fact that the attachment was raised more than a year after the date of the order on the claim, does not make any difference."

Finally, in *Bamapada* v. *Ramnath Mandal*[2] the head note runs:

"The conclusiveness of an order in a claim case contemplated by O. 21, r. 63 of the Civil Procedure Code is conditional on the continuance of the execution proceedings and the attachment issuing therefrom. Consequently, when the order is made on an application under O. 21, r. 58 dismissing a claim, but the sale itself held in the execution proceedings is set aside and the attachment *ipso facto* comes to an end, a subsequent suit brought beyond one year by the claimant for a declaration of his title is not barred under Art. 11, Sch. I of the Limitation Act, and that whether the execution proceedings come to an end within or beyond one year of the date of the order in the claim case".

It is thus seen that the attachment ceases to be effective after it is raised even from the date of the attachment itself. And the defeated claimant has the same right to put forward his earlier claims as he had at the time of filing his claim petition.

The second argument is that even if by operation of law there was technically a legal break in the adverse possession of 9th July, 1917, the defendant has been in possession for

---

1. A.I.R. 1931 Lah. 74. 2. (1935) 40 C.W.N. 146.

The Dharapuram Janopakara Nidhi, Ltd. *v.* Lakshminarayana Chettiar.

12 years beyond that date; for the attachment that is sought to be set aside in the present suit did not take place until 8th November, 1929. It is however argued for the appellant that the defendant has to prove that he got into possession again after 9th July, 1917, and that in any case it must be considered that the defendant was not in possession as long as the attachment continued. With regard to the first objection we have the finding of both the lower Courts that the defendant was actually in possession of this property adversely to the plaintiff even before 9th July, 1917, and remained continuously in possession adversely to the plaintiff. The effect of the order on 9th July, 1917, at the most, was to create a break. It did not in fact oust the defendant from possession; so that the defendant is entitled to rely on the fact that he was in possession adversely to the appellant from that date onwards. With regard to the second objection, attachment does not operate as a disturbance of possession; and there is no reason why, therefore, it should be considered that the continuance of an attachment after 9th July, 1917, should be considered as equivalent to an extension of the possession which was held technically against the defendant on 9th July, 1917.

In any event, therefore, the appellant fails and his appeal is accordingly dismissed with costs.

Leave to appeal granted.

S.V.V. —— *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Lahore.]

PRESENT:—LORD ROCHE, SIR SHADI LAL AND SIR GEORGE RANKIN.

Musammat Biro .. *Appellant**

v.

Atma Ram and others .. *Respondents.*

P.C. —— Mt. Biro *v.* Atma Ram.

Will—Genuineness—Circumstances to be considered—Unnatural character of dispositions—Statement as to relationship of collaterals made in previous suit—Statement being irrelevant to issue in suit—Effect—Evidence Act (I of 1872), S. 32 (5).

The plaintiffs, who claimed to be the collaterals of one, *H* challenged the validity of a gift made by his widow to one *B*. The defendants contended that the widow was the absolute owner of the estate left to her by her husband's will, and was empowered by her husband to dispose of the property

* P. C. Appeal No. 109 of 1933. 1st February, 1937.

P.C.
Mt. Biro
v.
Atma
Ram.

without any restriction, and the gift to *B* was made in exercise of such power. The plaintiffs impeached the genuineness of the will. The will purported to have been executed on 24th August, 1900, within one month of the testator's death. It was written in Urdu characters of which he was wholly ignorant. The will disposed of the estate in a manner contrary to the Hindu law on intestacy. The bulk of the estate was according to the will to vest in his widow and three other women, his mother, step-mother, and paternal aunt, and the will provided that the lady who survived the other three devisees would become the absolute owner of the estate. The only child of the testator was to get only a life estate in a house and shop. The will was not produced until 1922, after the commencement of the present litigation, though there were occasions during the twenty-two years that intervened when the widow or her advisers could have produced the will, had it been in existence. Moreover in July, 1920, the widow herself made a will, confirming the oral gift to *B*, stating the fact that she was holding her husband's estate "in the capacity of heir". In proof of their relationship as collaterals the plaintiffs relied on the statement made by one *M* in a previous suit in 1859. The defendants contended that such a statement was inadmissible in evidence as it was not relevant to the issue in the previous suit.

Held, that the onus of proving their relationship with *H* rested upon the plaintiffs, that the statement made in the suit of 1879 was admissible under S. 32 (5) of the Indian Evidence Act, and that it did not affect its admissibility that it was not relevant to the matter in issue in respect of which it was made. The plaintiff had therefore proved that they were reversioners of *H*, and as such they were entitled to contest the gift made by his widow, whose power of alienation was limited by the Hindu law.

Held, further, on the question whether the widow had succeeded in proving the execution of the will by *H*, that the trial Judge did not give sufficient weight to the circumstances which militated against its genuineness; inasmuch as it was most unlikely that a person having a wife and a minor unmarried daughter, who should be the objects of his affection, would make a will which would practically disinherit them, that the will was never produced in the twenty-two years intervening, though there were occasions when the widow or her advisers could have produced it, that if her husband's will had been the foundation of her title she would not refrain from citing it in her own will as the source of her authority, and that her failure to mention her husband's will on a critical occasion was incapable of explanation on any other reasonable hypothesis than that it did not exist at that time, and those circumstances warranted the conclusion that the will was not genuine.

Judgment of the Lahore High Court (Harrison and Tek Chand, JJ.) affirmed.

This is an appeal from a decree of the High Court of Judicature at Lahore, dated the 7th April, 1931, varying a decree of the Subordinate Judge, dated 3rd November, 1924, and decreeing the plaintiff-respondent's suit in part.

The relevant facts appear from the judgment of their Lordships.

The appeal was heard *ex parte*.

Leslie De Gruyther, K.C. and *H. K. Ghose* for Appellant.—The plaintiffs have not established that they were the reversioners

P.C.

Mt. Biro *v.* Atma Ram.

of the deceased. Neither the pedigree table produced by Munshi Lal in the suit of 1859, nor his statement therein, was admissible in evidence. The genuineness of Harbans Lal's will was established by cogent and unimpeachable evidence. The judgment of the trial Judge as to the credibility of the subscribing witnesses whom he had seen and heard was correct. The High Court was wrong in holding that the witnesses who saw Harbans Lal's will on later occasions in 1901 and 1919 were mistaken as to the identity of the document and that their testimony was vague and discrepant. The widow was empowered by her husband to dispose of the property without any restriction, and the gift in question having been made in the exercise of that power cannot be challenged.

1st February, 1937. Their Lordships' judgment was delivered by

Sir Shadi Lal.

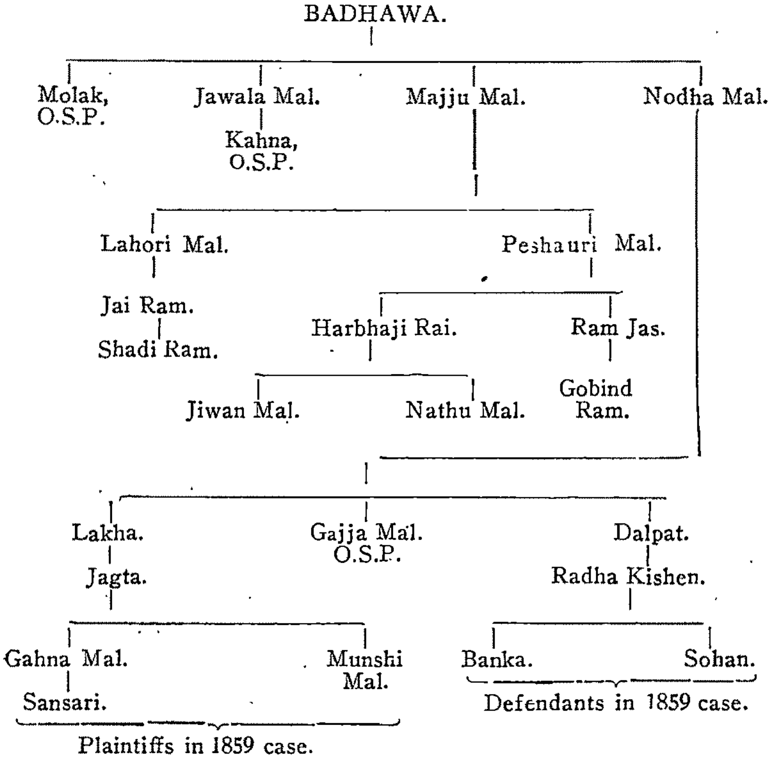
Sir Shadi Lal.—On the 20th September, 1900, one Harbans Lal, a Khatri of Ludhiana in the province of the Punjab, died leaving him surviving a widow, Musammat Bir Wanti *alias* Musammat Biro, and a daughter, Musammat Ishri, by a predeceased wife. The widow took possession of the whole of his estate, which consisted not only of movables, but also of agricultural land and house property. In July, 1920, she made a will, by which, after declaring that she had previously gifted certain immovable properties to her relative, Bhagat Ram, she gave various properties to charities. The dispute in the suit, which has led to this appeal, is confined to the gift made to Bhagat Ram, the validity of which is contested by the plaintiffs, who claim to be the collaterals of Musammat Biro's husband, Harbans Lal. They challenge her authority to make the transfer, and ask for a declaration that it should not adversely affect their right to succeed to the estate after her death.

The Trial Judge held that the plaintiffs had not proved their relationship with Harbans Lal, and he dismissed their suit, not only on that ground, but also on the ground that, under her husband's will, the widow was the absolute owner of the estate, and was entitled to make the gift in question. On appeal, the High Court at Lahore dissented from his judgment, and granted a decree in favour of the plaintiffs. From that decree Musammat Biro has brought the present appeal which has been heard *ex parte*.

P.C.
Mt. Biro v. Atma Ram.
Sir Shadi Lal.

Before pronouncing upon the main questions urged on behalf of the appellant, their Lordships desire to clear the ground by disposing of a matter which does not appear to have been raised in the Courts below. It is argued that, while in paragraphs 4 and 9 of their plaint the plaintiffs sought to impeach the oral gift alleged to have been made by Musammat Biro "about two or three years" before the institution of the suit, the judgment of the High Court deals with the gift mentioned by her in her will. A perusal of the will, which was relied upon by the alienee himself in support of the gift, however, shows that it recites and confirms the oral gift relating to a moiety of a residential house, which alone belonged to Harbans Lal; and it is the gift of that property only which has been declared to be inoperative as against the plaintiffs. It cannot, therefore, be said that the judgment of the High Court is at variance with the claim made in the plaint.

Coming now to the question of the relationship of the plaintiffs with Harbans Lal, their Lordships concur with the High Court that the plaintiffs have succeeded in proving that they are descendants in the male line of one Mauja Mal *alias* Majju Mal who was a paternal ancestor of Harbans Lal. To discharge the onus, which undoubtedly rested upon them, they propounded a pedigree table which shows that they are the great-grandsons of one Peshauri Mal, and that Harbans Lal was the great-grandson of Peshauri Mal's brother Lahori Mal. Now, as stated by the learned Judges of the High Court, the parties were agreed that Peshauri Mal and Lahori Mal were the ancestors of the plaintiffs and Harbans Lal respectively as shown in the pedigree table, but it was denied by the defendants that these two persons were the sons of Mauja Mal. The dispute was thus narrowed down to the simple issue of whether Mauja Mal was the father of Peshauri Mal and Lahori Mal, and this fact is amply proved by the statement which was made by one Munshi Mal in 1859. It appears that in that year he and his nephew Sansari brought a suit against their cousins Banka and Sohan for the recovery of their share of the estates left by Molak and Kahna. In order to prove that the then plaintiffs were collaterals of the two persons whose estates were the subject-matter of that suit, Munshi Mal deposed to a long pedigree table, which, with the omission of unnecessary names, is as follows:—



This pedigree shows that Peshauri Mal and Lahori Mal were the sons of Majju Mal, which is otherwise spelt as Mauja Mal. Munshi Mal had died long before the institution of the present suit, and it was, therefore, impossible to have his direct testimony. But the statement made by him in 1859 is admissible under S. 32 of the Indian Evidence Act, which sets out various exceptions to the general rule excluding hearsay. One of the exceptions, as enacted by sub-S. 5 of that section, provides that a statement relating to the existence of a relationship, made orally or in writing by a person who is dead, is admissible in evidence, if the person making the statement had special means of knowledge as to that relationship, and the statement was made by him before the question in dispute was raised. It is not disputed that Munshi Mal, as a member of the family, had special means of knowing the relationship stated by him, and that the statement was made by him before the present dispute arose. Both the conditions prescribed by the law have, therefore, been satisfied.

It is, however, argued that for determining the issue of relationship, which arose in that case, it was not necessary to

P.C.
Mt. Biro v. Atma Ram.
Sir Shadi Lal.

mention Majju Mal or his descendants; and that the statement of Munshi Mal, so far as it related to Majju Mal's branch, was irrelevant to that issue, and is, therefore, inadmissible in the present case. There is no warrant for this contention. The language of sub-S. 5 requires only that the statement tendered in evidence must be one made by a person having special means of knowing the relationship to which it relates, and that it must have been made *ante litem motam*. These are the only pre-requisites to the admission of the statement, and it is nowhere laid down that a third condition should be fulfilled, namely, that the statement should be relevant to the matter in issue in respect of which it was made. It is to be observed that the legislature does not say that the statement should have been made in a judicial case, where alone the question of relevance can arise. The language, unrestricted as it is by any such condition, embraces every statement as to relationship made *ante litem motam* by a person having special means of knowledge of it; and it is immaterial whether it was made in a judicial proceeding or otherwise. It is clear that for an extra-judicial statement there can be no issue with reference to which the question of relevancy may be determined. Neither the language of the statute, nor any principle of law, can be invoked to sustain the contention raised by the appellant.

Their Lordships are of opinion that the statement of Munshi Mal as to the descendants of Majju Mal, satisfying, as it does, both the conditions required by the law, was rightly received in evidence; and there is no valid reason for doubting the accuracy of the declaration that Peshauri Mal, the ancestor of the plaintiffs, was a brother of Lahori Mal who was admittedly the great-grandfather of Harbans Lal. The plaintiffs have, therefore, proved that they are reversioners of Harbans Lal, and as such they are entitled to contest the gift made by his widow, whose power of alienation was limited by the Hindu law.

But the appellant seeks to defeat their claim on the ground that she was empowered by her husband to dispose of the property without any restriction, and that the gift in question, having been made in the exercise of that power, cannot be challenged. In support of this contention she has propounded a will which purports to have been written by Harbans Lal in his own handwriting. The plaintiffs impeach the genuineness

P.C.
Mt. Biro v. Atma Ram.
Sir Shadi Lal.

of the will, and the question is whether she has succeeded in proving its execution by Harbans Lal.

Now, the document is written in Urdu characters, of which Harbans Lal was, according to the plaintiffs, wholly ignorant. It is not denied that he used to write his account books only in Lunda characters, and there is no document admitted, or proved, to have been written by him in Urdu script, with which the disputed handwriting could be compared. The appellant, however, places her reliance upon the evidence of the witnesses who claim to have attested the will, but the learned Judges of the High Court have fully discussed that evidence and found it to be "interested, contradictory, discrepant and insufficient to prove the due execution of the will." It is true that the Trial Judge expressed his opinion in favour of the execution of the will, but he had not heard the evidence of all the witnesses examined by the parties. Nor did he give sufficient weight to the circumstances which militate against its genuineness.

Before examining the provisions of the will, their Lordships observe that, if Harbans Lal had died intestate, the whole of his estate would, under the Hindu law by which he was governed, have devolved upon his widow with a right of alienation only for the purposes of necessity recognised by that law. On her death the estate would descend to his daughter with the same restricted right of alienation, and in the event of the latter's death her children would inherit it, male children taking the estate as absolute owners.

How does the will dispose of the estate? Mussammat Ishri, who was the only child of the testator, was, according to this document, to get at her marriage only a house and a shop, but even this property was given to her only for life, and was to revert to his estate on her dying unmarried or without leaving male issue. The bulk of the estate was to vest in his widow and three other women, namely, his mother, his step-mother and his paternal aunt. It is clear that under the Hindu law these three women were not entitled to any portion of the estate, but could claim only maintenance. But the will makes them joint owners equally with the widow. None of the devisees could get the estate partitioned or alienate it even for necessity. It was, however, provided that the lady, who survived the other three devisees, would become the absolute owner

P.C.

Mt. Biro v. Atma Ram.

Sir Shadi Lal.

of the estate. It is to be borne in mind that the widow of the testator would not get her husband's estate, if she predeceased any of her co-devisees.

In view of this strange provision, and considering the niggardly manner in which the daughter, who should have been the proper object of her father's bounty, was treated, their Lordships think that the will was an inofficious testament. The inclusion of the three ladies, who had no claim whatever upon his charity, among the devisees with rights, equal to those of his own widow, undoubtedly gave the testament the advantage of verisimilitude; but it would not inflict any injury upon her, if it came into existence after the deaths of those ladies. It is most unlikely that a person having a wife and a minor unmarried daughter, who should be the objects of his affection, would make a will which would practically disinherit them.

That the testament is unnatural and runs counter to the ordinary sentiments of persons, having a status in society similar to that of Harbans Lal, cannot be seriously disputed. But this is not the only circumstance which tells against its genuineness. The will purports to have been executed on 24th August, 1900, and the testator died within a month of that date. But it is strange that it was not produced until 1922, after the commencement of the present litigation. During this long period of 22 years, which intervened, there were occasions when the widow or her advisers could have produced the document, if it had been in existence; but they did not do so. In July, 1920, she herself made a will, which confirmed the oral gift to Bhagat Ram and gave other properties to educational institutions. How does she describe in it the nature of the estate held by her and her power of disposing of it? It is significant that she does not say that she had received the estate under her husband's will, but merely mentions the fact that she was holding it "in the capacity of heir" of her husband. Now, this description, which is usually employed to denote the estate which a Hindu widow gets upon her husband's dying intestate, does not convey any idea of her having received the estate under her husband's will. If that will had been the foundation of her title, she would have made a prominent mention of it in this document, which was executed by her in relation to the property inherited by her from her husband.

P.C. — Mt. Biro v. Atma Ram. — Sir Shadi Lal.

Moreover, the will in dispute conferred upon her an absolute estate, and that provision would furnish an irresistible authority for making the gift to Bhagat Râm and for other dispositions. There would, in that case, be no necessity for suggesting in her will various reasons, which are ordinarily mentioned to justify an alienation by a Hindu widow of the estate held by her on the usual widow's tenure. It cannot be believed that, if she was, at that time, armed with absolute power granted by her husband, she would refrain from citing it as the source of her authority.

Her failure to mention the will in question on a critical occasion is incapable of explanation on any other reasonable hypothesis than that it did not exist at that time. The circumstance, re-inforced, as it is, by the unnatural character of the dispositions contained in it, as explained above, warrants the conclusion that the appellant has failed to prove that the alleged will was made by Harbans Lal. Their Lordships consider it unnecessary to refer to other evidence, which, in their opinion, supports the same conclusion. They will, therefore, humbly advise His Majesty that the judgment of the High Court should be affirmed, and the appeal be dismissed. They will, however, make no order as to the costs, as there is no appearance before them by, or on behalf of, the respondents.

Solicitors for Appellant: *Nehra & Co.*

R. C. C. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR HORACE OWEN COMPTON BEASLEY, *Kt., Chief Justice* AND MR. JUSTICE STODART.

Sambasiva Reddi .. *Appellant** (*Respondent*)

v.

The Official Receiver of South Arcot .. *Respondent* (*Petitioner*).

Sambasiva Reddi v. Official Receiver, South Arcot.

Provincial Insolvency Act (V of 1920), S. 3—Subordinate Court dealing with insolvency petition—Insolvency arising out of limit of jurisdiction of Subordinate Court—Notification of Government—Transfer by District Judge to Subordinate Court, whether proper.

It must be borne in mind that a Subordinate Court has no jurisdiction whatsoever under Insolvency Act and it is only by reason of S. 3 of the Provincial Insolvency Act and notifications issued thereunder that it gets any jurisdiction.

* A. A. O. No. 97 of 1934. 5th January, 1937.

Sambasiva Reddi *v.* Official Receiver, South Arcot.

Premchand Indoji v. *Gopalappa*, (1923) 45 M.L.J. 689, followed.

Where a petition in insolvency arising out of the limits of the territorial jurisdiction of a Subordinate Court was transferred to it by the District Judge on the ground that a government notification investing powers in the Subordinate Courts under the Provincial Insolvency Act in respect of all petitions presented by creditors had been in existence.

Held, that quite apart from that authority, from the words of S. 3 itself it would be clear that the Act does not invest a Subordinate Court with jurisdiction to try any insolvency matter which originates outside the local limits of its jurisdiction. Therefore the transfer by the District Court of the petition was *ultra vires* and the Subordinate Judge's Court had no jurisdiction at all to deal with the matter.

Appeal against the order of the Court of the Subordinate Judge of Cuddalore dated the 7th December, 1933, in I. A. No. 6 of 1933 in I. P. No. 6 of 1930 on the file of the District Court of South Arcot (I. A. No. 450 of 1932 in I. P. No. 6 of 1930 on the file of the District Court of South Arcot).

T. R. Srinivasan for Appellant.

S. Annamalai for Respondent.

The judgment of the Court was delivered by

Beasley C.J.

The Chief Justice.—This Civil Miscellaneous Appeal arises from the following circumstances. The Official Receiver of South Arcot presented to the District Court at Cuddalore a petition under Ss. 53, 54 and 4 of the Provincial Insolvency Act to set aside two mortgages. The learned District Judge transferred that petition to the file of the Subordinate Court of Cuddalore which dealt with the petition and it was declared the two mortgages in question were fraudulent and void as against the Official Receiver under Ss. 53 and 54 of the Provincial Insolvency Act. Hence this Civil Miscellaneous Appeal. When the matter was first argued before us we took the point that the Subordinate Judge of Cuddalore had no jurisdiction to entertain the petition at all and, as there seemed to be at that time some doubt regarding the local limits of the jurisdiction of that Court and we wished to know how the petition came to be transferred by the District Court to that Subordinate Court, we adjourned the matter requesting the District Judge to report the circumstances in which the Subordinate Judge came to try and decide the petition and also what the insolvency jurisdictions of the District and Sub-Court are respectively and under what notification of the Government the Sub-Court has been given insolvency jurisdiction. The matter now comes before us on the report of the District Judge at Cuddalore. He reports that the Sub-Court, Cuddalore, was

Sambasiva Reddi *v.* Official Receiver, South Arcot.

Beasley, C.J.

from the 1st November, 1913, invested with local jurisdiction over the whole of Cuddalore, Chidambaram and Vriddhachalam Taluks of the South Arcot District and that this was by notification at page 1796 of Part II of the *Fort St. George Gazette* dated 28th October, 1913. Then as regards the insolvency jurisdiction he reports as follows:—

"Under G. O. No. 1731 Law (General) dated 5th June, 1924, communicated in High Court's Dis. No. 1254 of 1924 published at page 650, Part I of the *Fort St. George Gazette* dated 10th June, 1924, all Subordinate Courts in the Presidency were invested with jurisdiction under the Provincial Insolvency Act in respect of all petitions presented by creditors. Ever since then the District Court had been exercising insolvency jurisdiction over the entire District while the Sub-Court was exercising concurrent jurisdiction over the three taluks of Chidambaram, Vriddhachalam and Cuddalore over which it had territorial jurisdiction".

He adds that his predecessor in order to give work to the Additional Sub-Judge transferred the petition in question to him and that was how the Sub-Court came to hear and decide the petition.

The question is whether the District Judge had any power to transfer this petition to the Subordinate Judge of Cuddalore. It is common ground that this insolvency was outside the territorial jurisdiction of that Sub-Court, that is to say, it originated in some place outside the local limits of the jurisdiction of that Court. The question therefore is whether the Provincial Insolvency Act gives any power to the Local Government by notification to give jurisdiction to a Subordinate Court which otherwise and apart from the notification has no insolvency jurisdiction whatsoever, to deal with and dispose of insolvency matters which originate in some place which is not within the local limits of the jurisdiction of that Court. The notification in question was issued under S. 3 of the Provincial Insolvency Act which reads as follows:—

"The District Courts shall be the Courts having jurisdiction under this Act".

"Provided that the Local Government may, by notification in the local Official Gazette, invest any Court Subordinate to a District Court with jurisdiction in any class of cases and any Court so invested shall within the local limits of its jurisdiction have concurrent jurisdiction with the District Court under this Act".

In pursuance of the powers given under that section the Local Government issued the notification in question. We have heard a full argument upon this point and our attention has been drawn to a decided case of this Court which seems to us to be directly in point. Quite apart from that authority it

Sambasiva Reddi v. Official Receiver, South Arcot.

Beasley, C.J.

seems to us to be quite clear from the words of the section itself that the Act does not invest a Subordinate Court with jurisdiction to try any insolvency matter which originates outside the local limits of its jurisdiction. The words in the section:

"Shall within the local limits of its jurisdiction have concurrent jurisdiction with the District Court under this Act"

seem to us to be con clusive of this matter. Nevertheless it has been contended on the other side that the words 'the local limits of its jurisdiction' apply only to original insolvency matters and that the District Court has power by reason of the Civil Procedure Code to transfer any matter including insolvency matters to a Subordinate Court and S. 5 (2) is invoked in support of this contention. In our view, that sub-section affords no assistance because the words there, *viz.*, "subject to the provisions of the Insolvency Act" qualify the whole section. It must be borne in mind that a Subordinate Court has no jurisdiction whatsoever in insolvency and it is only by reason of S. 3 and notifications issued thereunder that it gets any jurisdiction. If no notification had been issued by Local Government, then clearly the Subordinate Court of Cuddalore could not have dealt with insolvency matters at all. This position was clearly indicated in *Premchand Indoji* v. *Gopalappa*[1] a decision by Spencer and Devadoss, JJ. The head note of that case is as follows:—

"Under S. 3 of the Provincial Insolvency Act the District Court is the only Court having jurisdiction to deal with creditor's petition in the absence of any notification of the Local Government investing Subordinate Courts with jurisdiction over such class of cases. In a case in which there was no such notification the District Judge's order transferring a petition to the Sub-Court for disposal was *ultra vires*".

We consider this case to be directly in point although, in our view, having regard to the very clear words of S. 3 of the Act, no authority is required. For these reasons we are clearly of the opinion that the order of transfer by the District Judge of this petition to the Sub-Court was *ultra vires* and that the Sub-Court had no jurisdiction at all to deal with this matter. We have taken this objection ourselves which we consider to be decisive of this appeal and therefore the order before us must be set aside and the District Judge must be directed to take the case on his file and dispose

1. (1923) 45 M.L.J. 689.

Sambasiva Reddi v. Official Receiver, South Arcot.

Beasley, C.J.

of it according to law. In view of the fact that no objection was taken by the appellant to the jurisdiction of the Sub-Court to entertain the petition and the objection was taken by ourselves, we direct the appellant to bear his costs of this appeal. The Official Receiver will get his costs out of the estate.

K. C. —— *Order set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATARAMANA RAO.

Pallipurayil Asan Kutti .. *Petitioner* (Petitioner)*

v.

Mukkolakkal Koyyaman Kutti .. *Respondent (1st Defendant).*

Asan Kutti v. Koyyaman Kutti.

Civil Procedure Code (V of 1908), S. 153—Word 'proceeding' meaning of—Mortgagee of properties—Execution—Attachment of properties of judgment-debtor—Applying for challan to be issued—Issue of challan and deposit in Taluq treasury of decree amount—Prayer for adopting it as an application under O. 21, r. 89, Civil Procedure Code, for setting aside sale—Whether proper.

A property was brought to sale and purchased by the assignee decree-holder. The third defendant in the suit who was a mortgagee of the properties attached, put in an application praying that a challan may be issued depositing in the Taluq treasury the amount mentioned in the execution application. The challan was issued and the money deposited and receipt obtained from the treasury. The receipt was filed in Court with an application by the third defendant's pleader. The application was styled a memorandum and contained "The receipt obtained in the matter of deposit into Taluq treasury the sum of so and so comprising the decree amount in the suit, poundage-fee and percentage of purchase money (auction profit)". But there was no formal prayer to set aside the sale or any independent application to do so. Later on he applied to set aside the sale and alleged in the affidavit that apart from his prayer to set aside the sale, he had requested the Court to treat the application for challan and the memorandum as an application under O. 21, r. 89. On objection being taken by the decree-holder that the application was barred by limitation he filed an application to amend the memorandum by adding the prayer. 'It is prayed that the sale in the above suit may be set aside'. The amendment was held not to be proper by the lower appellate Court on the ground that the memo. could not be called a proceeding within the meaning of S. 153, Civil Procedure Code and it was not capable of amendment and there was no proper application under O. 21, r. 89, Civil Procedure Code.

Held, (1) that the lower Court's decision was unsound.

(2) that the interpretation of the term 'proceeding' in S. 153, Civil Procedure Code, should be held to be the same as the definition of 'proceeding' given to it in S. 17 (2), cl. (6) of the Indian Registration Act, that is 'any application to the Court of justice however made, for aid in the enforcement of rights, for relief, for redress of injuries, for damages or for any remedial object'.

---

* C. R. P. No. 1186 of 1934. 18th November, 1936.

Asan Kutti *v.* Koyyaman Kutti.

Govindaswami Mudaliar v. *Rasu Mudaliar*, (1934) 68 M.L.J. 41: I.L.R. 58 Mad. 781 at 786, followed.

(3) That the application for challan or the memo. would be a proceeding within the meaning of S. 153, Civil Procedure Code.

Venkatasubba Rao v. *Narayana Rao*, (1921) 15 L. W. 450 and *Chakrapani Padhi* v. *Krushno Naiko*, (1925) 23 L.W. 757 (1), explained.

Abdul Latif Moonshi v. *Jadub Chandra Mitter*, (1897) I.L.R. 25 Cal. 216 and *Ramraj Singh* v. *Rabi Prasad*, (1921) 63 I.C. 140, referred to and relied on.

Petition under S. 115 of Act V of 1908 and S. 107 of the Government of India Act praying the High Court to revise the order of the District Court of North Malabar dated 17th November, 1933, and made in C.M.A. No. 17 of 1933 preferred against the order of the Court of the District Munsiff of Badagara dated 6th March, 1933 and made in R. E. A. No. 17 of 1933 in O. S. No. 602 of 1924.

C. S. Krishnamurthi Aiyar for Petitioner.

M. C. Sridharan for Respondent.

The Court delivered the following

JUDGMENT.—This Civil Revision Petition arises out of an application made to set aside a sale of immovable property under O. 21, r. 89, Civil Procedure Code. The sale was held on the 29th November, 1932. The property belonged to the first defendant who made no application to set aside the sale. It was purchased by the assignee decree-holder. The third defendant in the suit who is a mortgagee put in an application I. A. No. 616 of 1932 on the 16th December, 1932, praying that a challan may be issued depositing in the Taluk treasury the amount mentioned in the said application . . . . In the application the purpose for which the challan was applied, the amount of the decree poundage-fee, the percentage of purchase money required for setting aside the sale under O. 21, r. 89, the name of the purchaser and the fact of sale are all mentioned. The challan was accordingly issued, money was deposited and a receipt obtained from the treasury. The said receipt was filed in Court on the 21st December, 1932, with an application on behalf of the third defendant by his pleader. The application which was styled a memorandum ran thus:

"The receipt obtained in the matter of the deposit into Kurumbranad taluk treasury the sum of Rs. 385-14-6 comprising the decree amount in the above suit, poundage fee and percentage of purchase money (auction profit)".

But there was no formal prayer to set aside the sale or any independent application made to do so. On the 4th

Asan Kutti v. Koyyaman Kutti.

January, 1933, an application was made to set aside the sale. In the affidavit he alleged the fact of his applying for the challan and also the application filed by him along with the receipt into Court. Paragraphs 7 and 8 of the said petition are important and they are as follows :—

"7. The application for challan on the 16th December, 1932, the memorandum filed on the 21st along with the receipt for the deposit of the money are only for the purpose of getting the sale set aside. The above applications should be also taken for an application to set aside the sale".

"8. If the Court should consider for any reason that it could not grant relief as per the application filed herewith for setting aside the sale, the sale should be set aside on the strength of the application for challan and the memorandum and I am prepared to pay the necessary court-fee therefor".

It will thus be seen that apart from his independent prayer to set aside the sale he requested the Court to treat the application for challan and the memorandum filed on the 21st December, 1933, as applications to set aside the sale. On objection taken by the decree-holder that the application was barred by limitation he filed an application to amend the memorandum filed by him on the 21st December, 1933, with the receipt for the money deposited by adding a prayer thus:—

"It is prayed that the sale in the above suit may be set aside".

This amendment was allowed by the learned District Munsiff and he set aside the sale. On appeal the learned District Subordinate Judge of North Malabar reversed the order of the District Munsiff holding that a memo. cannot be called a proceeding within the meaning of S. 153, Civil Procedure Code, and it was not capable of amendment and there was no proper application under O. 21, r. 89, Civil Procedure Code. It is against this order the present Civil Revision Petition has been filed. There is a conflict of view in this Court whether an application for challan or an application accompanying the receipt for the money deposited could by itself be treated as applications for setting aside the sale. In an unreported decision C. R. P. No. 106 of 1912 Sankaran Nair, J., was of opinion that an application for deposit of money may be treated as an application to set aside a sale. In *Venkatasubba Rao* v. *Narayana Rao*[1], Krishnan, J., took a different view. He says that a lodgment schedule filed in Court along with the money as required by r. 3 of the Civil Rules of Practice cannot be treated as equivalent to an applica-

1. (1921) 15 L.W. 450.

Asan Kutti v. Koyyaman Kutti

tion required by O. 21, r. 89, Civil Procedure Code, in *Chakrapani Padhi* v. *Krushno Naiko*[1] Waller, J., took the same view. In *Parat Veettil Seethi* v. *Ambalath Veettil Kolathur*[2] when the question arose under circumstances exactly as in the present case Kumaraswami Sastri, J., was inclined to the view that it would have been open to the Court to amend the memorandum filed as in this case and he observed:

"In the present case it appears that a petition was put in by the petitioner on the 6th June, 1911, stating that he had paid the money into the treasury and though the petition contains no formal prayer to set aside the sale there can be little doubt that this was the object of the petitioner. This petition if it had contained a formal prayer would have been in time if it was filed on the 6th June, as petitioner had the benefit of the summer vacation intervening. There is nothing to prevent the Court from allowing the petitioner to amend the petition by adding a formal prayer. This course was adopted by Sadasivier and Napier, JJ., in appeal against Appellate Order No. 66 of 1913 in an analogous case".

I may observe that the view taken in Calcutta and Allahabad is that an application for a challan or an application for deposit accompanying the receipt as in this case can be treated as applications to set aside the sale on the ground that the very object of the application was to set aside the sale and O. 21, r. 89 does not require an application in writing (Vide *Abdul Latif Moonshi* v. *Jadub Chandra Mitter*[3] and *Ramraj Singh* v. *Rabi Prasad*[4] whether this view can be accepted or not, the view of the lower Court that the memo. is not a proceeding and not capable of amendment is unsound. In *Govindaswami Mudaliar* v. *Rasu Mudaliar*[5] Venkatasubba Rao, J., adopted the definition of "proceeding" given by Black in his Law Dictionary for interpreting the term "proceeding" in S. 17 (2), cl. (6) of the Indian Registration Act, *viz.*:—

"Any application to a Court of justice however made, for aid in the enforcement of rights, for relief, for redress of injuries, for damages or for any remedial object".

I would accept the same interpretation for the term "proceeding" in S. 153 of the Civil Procedure Code. The application for challan or the memo. of the 21st December, 1932, would be a proceeding within the meaning of S. 153, Civil Procedure Code. There is nothing in *Venkatasubba Rao* v. *Narayana Rao*[6] and *Chakrapani Padhi* v. *Krushno Naiko*[1] which is

1. (1925) 23 L.W. 757 (1).
2. (1915) 32 I.C. 45.
3. (1897) I.L.R. 25 Cal. 216.
4. (1921) 63 I.C. 140.
5. (1934) 68 M.L.J. 41: I.L.R. 58 Mad. 781 at 786.
6. (1921) 15 L.W. 450.

Asan Kutti v. Koyyaman Kutti.

against this view. It was therefore competent to the learned District Munsif to allow the petitioner to amend the application as he did. The learned District Judge in my opinion was wrong in interfering with the exercise of discretion on the erroneous view that the memorandum filed on the 21st December, 1932, is not a proceeding. I therefore reverse the order of the learned District Judge and restore that of the District Munsiff. But I direct the petitioner to pay the respondent his costs in all the Courts including the costs of the revision petition. I further direct that the respondent will not be accountable for any mesne profits up-to-date of delivery but the same will be taken as set off against the interest payable on the amount of his purchase money.

K. C. —— *Order reversed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VARADACHARIAR AND MR. JUSTICE HORWILL.

Sreemadh Deivasigamani Ponnambala Desikar, Head of Tiruvannamalai Mutt at Kunnakudi, Ramnad District .. *Appellant** (*2nd Plaintiff*).

v.

Raja Srimathu Muthu Vijayaregunatha Doraisingam *alias* Gouri Vallabha Thevar, Zamindar of Sivaganga through the Estate Collector, Sivaganga and another.. *Respondents* (*Defendants*).

Deivasigamani Ponnambala Desikar v. Zamindar of Sivaganga.

Madras Survey and Boundaries Act (VIII of 1923), S. 14—Boundary dispute between two neighbouring estates—Landholders alone parties—Ryots in possession of lands in the estates, if necessary parties—Application to add ryots after three years.

In a dispute between one estate-holder and a neighbouring estate-holder in respect of the boundary between the two estates, the estate-holders are the persons *prima facie* interested in the estate within the meaning of S. 14 of the Madras Survey and Boundaries Act.

Though it may be desirable to have the ryots of the two villages who are said to be in possession and enjoyment of several items of the property in dispute as persons interested in the boundary in question, they are not necessary parties to the suit and their non-joinder is not fatal to the maintainability of the suit. The Court can therefore add them as parties even after the period of limitation has expired.

---

* Appeal No. 415 of 1932. 7th October, 1936.

Deivasigamani Ponnambala Desikar *v.* Zamindar of Sivaganga.

Appeal against the decree of the Court of the Subordinate Judge (Principal) of Devokottai in O. S. No. 105 of 1927.

K. Rajah Aiyar, V. Ramaswamy Aiyar and *R. Rangachari* for Appellant.

B. Sitarama Rao and *N. G. Krishna Aiyangar* for Respondents.

The judgment of the Court was delivered by

Varadachariar, J.

Varadachariar, J.—This appeal arises out of a suit filed by the Pandarasannadhi of the Kunnakudi Mutt for the purpose of getting a decision by an appellate Survey Officer (dated 22nd September, 1924) set aside in some respects. There are two villages which may be referred to as *M* and *A*. *M* belongs to the Kunnakudi Mutt of which the plaintiff is the Pandarasannadhi and is a Dharmasanam village in the Sivaganga estate. *A* belongs to a Devastanam in the Sivaganga estate and the Zamindar is the trustee thereof. The second defendant is an alienee from the Zamindar.

Survey operations were started in this locality in 1922 or 1923. It is not clear from the records whether the proceedings were started when Act IV of 1897 was in force or after Act VIII of 1923 came into force. It may be a question of some difficulty whether in dealing with the effects of the survey, the Court should apply the provisions of Act IV of 1897 or those of Act VIII of 1923. There is reason to think that there is some marked difference between the two acts in respect of the effect of the survey, if a suit is not brought within three years allowed by the Act. We do not pursue that question further because in the present instance the suit was undoubtedly filed within three years of the decision of the appellate survey officer.

In the plaint as originally framed only the Zamindar was the defendant; the second defendant was later on impleaded as an alienee from the Zamindar subsequent to the institution of the suit. There is a statement in paragraph 9 of the plaint that:

"The lands in dispute are warapat punja lands in the holding of the various pattadars of the village and there have been for a long number of years exchange of pattas and muchilikas in respect of the suit lands and the mutt as well as the lessees from the mutt have been in enjoyment of the same by collecting the waram, etc., due to them".

In the written statements filed in January, 1928, by the first defendant and in February, 1929, by the second defendant, objections on the score of non-joinder were taken. The

Deivasigamani Ponnambala Desikar *v.* Zamindar of Sivaganga.

Varadachariar, J.

objection in paragraph 13 of the first defendant's written statement is general and does not specify who the ryots are that were asked to be joined. In the second defendant's written statement, paragraph 6 puts it more specifically that the plaintiff should have impleaded the tenants who according to him were in possession under him. The issues raised the question of non-joinder in various forms, but the question was not dealt with in the first instance nor for more than a couple of years after the written statements had been filed.

A large mass of documentary evidence was filed in the case and a number of witnesses have been examined on both sides. On the 11th July, 1932, it appears from the B Diary that arguments were heard on issues 3, 5, 6 and 7 which were apparently regarded as preliminary issues. We are constrained to observe that it is a pity that these preliminary arguments had not been thought of at a much earlier stage, before time was spent on recording so much evidence. After hearing these preliminary arguments, an order was passed on the non-joinder issue on 1st August, 1932. The learned Judge held that both on general considerations and by virtue of S. 14 of the Survey and Boundaries Act, the ryots of the *two* villages who were said to be in possession and enjoyment of several items of the property in dispute were necessary parties to the suit. Time was accordingly given to enable the plaintiffs to apply to implead them. I. A. No. 1096 of 1932 was accordingly filed. That application came on for hearing in September, 1932, and the learned Judge then held that as the non-joinder of the persons proposed to be added was fatal to the maintainability of the suit and they were proposed to be added as defendants only after the three years' period of limitation had expired, it was not proper to allow them to be joined as parties to the suit at that stage. The result was that the learned Judge dismissed the suit. Hence this appeal by the plaintiff.

The order of the learned Judge has been supported by Mr. Sitarama Rao on the ground that under Ss. 13 and 14 of Act VIII of 1923 a decision of the Survey Officer demarcating a boundary is conclusive not merely between the parties to a dispute before the survey authorities (as was held under the Act of 1897) but as against all persons interested in that boundary line and it could not therefore have been the intention of the legislature that a suit under S. 14 could

be instituted without impleading *eo nominee* all persons who may be interested in that boundary line. It may also be mentioned that in Act IV of 1897 there was an explanation to S. 13 to the effect that:

"Where parties litigate *bona fide* in respect of boundaries of property claimed in common for themselves and others, all persons interested in such boundary dispute shall, for the purpose of this section, be deemed to claim under parties so litigating".

This provision has been replaced in S. 14 of the present Act by the following clause:

"The plaintiff in such suit shall join as parties to it all persons whom he has reason to believe to be interested in the boundary which is the subject of the suit".

Mr. Sitarama Rao contends that the result of this substitution is that if any persons whom the plaintiff must have believed to be interested in the boundary in question are not impleaded the whole suit must fail because it will not be possible to correct the survey officer's determination only as against some of the persons interested while leaving it in force as against other persons.

Mr. Sitarama Rao may be right to this extent that it is desirable to have before the Court all persons interested in the boundary in question; but we think it will be reading too much into that provision to say that the omission to implead any person so interested is necessarily fatal to the suit. The very language in which that clause is couched, by reference to the reasonable belief of the plaintiff as to the persons interested, is against the extreme contention put forward by Mr. Sitarama Rao. It must also be remembered that the Survey and Boundaries Act deals with the Survey of lands in estates as well as lands in ryotwari areas. In applying S. 14 to survey of lands in estates there are, it seems to us, other considerations also to be borne in mind. Within an estate, there may be various grades of cultivators possessing various rights as against the holder of the estate. There may be cultivators of private lands; there may be persons in possession of non-occupancy lands and of occupancy lands of service tenures and so on. There may also be waste lands in the estate. It is one thing to postulate that between the holder of the estate on the one hand and against the various persons in occupation of a particular piece of land in the estate on the other, there are varying interests and tenures; but it does not seem to us to be the correct principle that in a dispute between

Deivasigamani Ponnambala Desikar *v.* Zamindar of Sivaganga.

Varadachariar, J.

the holder of the estate and the holder of any neighbouring estate in respect of the boundary between the two estates, the tenants or cultivators under the holder of either estate are *prima facie* persons interested within the meaning of this part of S. 14, at any rate not to the extent that their non-joinder should be regarded as fatal to the maintainability of the suit. It has been decided with reference to the language of the permanent settlement regulation that for various purposes the registered proprietor is the *owner* of the area comprised in the settlement and in recent cases from Calcutta, the Privy Council have laid down that he is the owner even to the extent of being regarded as the person entitled to the rights to minerals in the land (*cf.* S. 7 of the Madras Estates Land Act). We are therefore inclined to think that in a dispute between one estate-holder and a neighbouring estate holder, in respect of the boundary between the two estates, the estate-holders are the persons *prima facie* interested in the dispute within the meaning of S. 14. It is significant in this connection to note that when the survey now in question was conducted the only persons who appeared in response to the notice under S. 6 were plaintiff and the Zamindar. In this view, the learned Judge seems to us to have gone too far in holding that the omission to add the ryots as parties to the suit in the first instance was such a defect as necessitated the dismissal of the suit.

It is true that the application to add the ryots as parties was made after the lapse of three years from the date of the survey officer's decision. But in view of the principle laid down in *Guruvayya* v. *Dattatraya*[1] that circumstance will not of itself justify either the dismissal of the application to implead them or the dismissal of the suit. We would therefore direct that I. A. No. 1096 of 1932 be ordered as prayed for. We would also set aside the decree of the lower Court dismissing the suit and remand the case for disposal on the merits. We cannot however help thinking that this situation has been brought about by the plaintiff himself and might well have been avoided if he had taken steps earlier to file the suit or had impleaded the ryots in the ordinary course. We accordingly direct that up to this stage all costs incurred shall be respectively borne by the parties themselves. There will be a refund of court-fee on the memorandum of appeal.

S.V.V. —— *Case remanded.*

1. (1903) I.L.R. 28 Bom. 11.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATARAMANA RAO.

K. M. M. Palaniappa Chettiar .. *Petitioner* (Petitioner)*

v.

Ramaswami Servai and others .. *Respondents (Respondents and Nil).*

Palaniappa Chettiar *v.* Ramaswami Servai.

Civil Procedure Code (V of 1908), O. 21, rr. 95, 101 and 103—Application for removal of obstruction to possession—Dismissal of, as question of title pending determination—Determination of title in the other suit—Decision within one year of order on possession petition—No suit filed under O. 21, r. 103—Later petition for possession—If maintainable—Later petition one for revival of earlier petition.

In execution of a mortgage decree against the father alone, the mortgagee purchased the properties himself. But before the sale, one of the sons of the mortgagor had filed a suit for partition against the father, the other sons and the mortgagee and therein impeached the mortgage as not binding on the family. As the mortgagee was obstructed by the sons when he went to take possession of the properties, he filed an application E. A. No. 203 of 1932 to remove the obstruction. As the partition suit was then pending the executing Court without going into the merits, dismissed the E. A. on 9th July, 1932, holding that the purchaser failed to prove that the resistance was caused by the sons at the instance of the father. The partition suit was decided finally on 30th January, 1933, and it was therein held that the sons were bound by the mortgage and the auction sale. The decree-holder did not file a suit to set aside the order on E. A. No. 203 of 1932 but on 22nd August, 1933, he again applied under O. 21, r. 95 for possession. It was contended that as no suit was filed within one year to set aside the order on E. A. No. 203 of 1932, and also by virtue of the dismissal of that petition, this petition was not maintainable.

Held, that what is contemplated as necessary to supersede the order under O. 21, r. 101 is the establishment of the title to the property and what makes the order on the petition conclusive is not the failure to institute a suit under O. 21, r. 103 but the failure to have the *right established* within one year. If the unsuccessful claimant is able to get this right declared or established within a year as in this case, it is not necessary that he should also file a suit under O. 21, r. 103 as that will be a vain litigation.

Kumaram Uni Achan v. *Kunhikrishnan Nair*, (1923) 75 I.C. 814, distinguished.

Further as the prior execution application was dismissed without going into the merits in view of the partition suit and on the assumption that the sons were not bound by the decree, which assumption is later held, to be erroneous, this later petition is to be treated as a revival of the earlier petition and is therefore not barred by the dismissal of that petition.

Sundaramma v. *Abdul Khadar*, (1932) 64 M.L.J. 664: I.L.R. 56 Mad. 490 (F.B.), relied on.

Petition under Ss. 115 of Act V of 1908 and 107 of the Government of India Act, praying the High Court to revise the order of the Court of the Subordinate Judge of Devakottai

---

* C. R. P. No. 1855 of 1933. 15th December, 1936.

Palaniappa Chettiar v. Ramaswami Servai.

dated 26th September, 1933 and made in E. A. No. 977 of 1933 in O. S. No. 31 of 1929.

A. Swaminatha Aiyar for Petitioner.

C. A. Mahomed Ibrahim for Respondents.

The Court delivered the following

JUDGMENT.—This is an application to revise an order refusing delivery of possession under O. 21, r. 95, Civil Procedure Code. The petitioner filed O. S. No. 31 of 1929 on the file of the Subordinate Judge's Court of Devakottai on a mortgage executed by one Muthuswami Servai, father of respondents 1 and 2 herein. The property mortgaged was admittedly joint family property wherein the said Muthuswami Servai and his sons were interested. In execution of the said decree three items of mortgaged property mentioned in the decree therein were brought to sale and purchased by the petitioner himself on the 29th June, 1931. After the purchase, the petitioner filed an application E. A. No. 118 of 1932 for delivery of possession of the said items and obtained delivery of items 2 and 3 but not of item 1. This was in consequence of an obstruction by respondents 1 and 2. The petitioner then filed an application on the 4th March, 1932, E. A. No. 203 of 1932 on the file of the Court of the Subordinate Judge of Devakottah for removal of the obstruction. It may be stated that before the petitioner purchased the said properties, the second respondent, Krishna Servai had filed a suit for partition O. S. No. 153 of 1929 on the file of the District Munsiff's Court of Devakottah against his father Muthuswamy Servai and his brother including the first respondent in this case. In the said suit Krishna Servai impeached the said mortgage on the ground that it was not binding on the family and therefore on respondents 1 and 2 herein. The first respondent supported Krishna Servai in the said litigation. To the said suit the petitioner was made a party. When E. A. No. 203 of 1932 was taken up for hearing the said suit was pending. In answer to the said application both the respondents 1 and 2 filed a counter-affidavit stating their objections to the request made by the petitioner for delivery of possession of the property. In paragraphs 5 and 6 of the counter-affidavit they set out in detail the nature of their objections. They stated that the properties which were the subject-matter of the mortgage suit O. S. No. 31 of 1929 were the subject-matter of a suit between the parties in O. S.

Palaniappa Chettiar *v.* Ramaswami Servai.

No. 153 of 1929, that the said suit was pending trial, that as the petitioner purchased the properties pending the said litigation, his purchase would be affected by the doctrine of *lis pendens* and he would not be entitled to any relief inconsistent with the claim of the respondents. They further alleged thus in paragraph 6 of the said affidavit:

"In view of the considerations set forth in paragraph 5 *supra*, this Court trying the same question and giving a decision thereon may result in a conflict of decisions by two Courts which ought not to be allowed".

They also alleged that in view of the said litigation the question of title should not be gone into. The learned Subordinate Judge who dealt with the said application did not go into the question whether in view of the fact that the mortgage was by the father the head of the family, it was open to the defendants to resist the purchaser's claim for delivery of possession, but as the suit O. S. No. 153 of 1929 was pending he dismissed the application holding that the petitioner failed to prove that the resistance was caused by the respondents at the instance of the judgment-debtor. This order was passed on the 9th July, 1932. The said O. S. No. 153 of 1929 was disposed of by the learned District Munsiff of Devakottah on the 19th August, 1932, and so far as the mortgage in favour of the petitioner was concerned the learned Judge dismissed the suit. He held that Krishna Servai and Ramaswami Servai the respondents 2 and 1 herein, were bound by the mortgage and the auction sale and it was no longer open to them to recover any portion of the said property. There was an appeal against the said decision and it was confirmed by the learned Subordinate Judge of Devakottah on the 30th January, 1933. It will thus be seen that within a year from 9th July, 1932, the date on which E. A. No. 203 of 1932 was dismissed there has been a final adjudication by a competent Court declaring and establishing the right of the petitioner to the suit property and as the learned Subordinate Judge observes in the order which is now sought to be revised:

" By virtue of the judgment on appeal it is common ground that the respondents could not claim to be owners of item 1 and the title must be taken to have passed to the present petitioner auction purchaser".

After the decision of the appellate Court, on the 22nd August, 1933, the petitioner filed the application out of which this revision petition arises, E.A. No. 977 of 1933 under O. 21, r. 95 for delivery of possession of item 1. Objection was taken

Palaniappa Chettiar v. Ramaswami Servai.

that as the petitioner did not file a suit within one year as required by O. 21, r. 103, Civil Procedure Code, the order on the said petition became conclusive and the petitioner is not therefore entitled to obtain any relief. This objection prevailed in the Court below. The question is whether the view taken by the lower Court is sound. O. 21, r. 103, Civil Procedure Code, provides that:

> "Any party not being a judgment-debtor against whom an order is made under r. 98, r. 99 or r. 101 may institute a suit to establish the right which he claims to the present possession of the property, but, subject to the result of such suit (if any) the order shall be conclusive".

Art. II of the Limitation Act provides one year within which the said suit should be brought. Once the year is allowed to elapse, the order operates as a conclusive adjudication of the right to the property based on the auction purchase. The party against whom the adverse order is passed under r. 99 or 101 whether as plaintiff or as defendant is precluded from asserting the said right. (Vide *B. Krishna Rau* v. *Lakshmana Shanbhogue*[1].) The fact that a suit was pending wherein the question of the title to the property was in issue, was held not to be enough. In *Kumaram Uni Achan* v. *Kunhikrishnan Nair*[2] an order was passed under O. 21, r. 101 when a suit regarding the title to the property was in issue. In the written statement filed in the suit, the defendants against whom the adverse order was passed under O. 21, r. 101 did raise the question of title but during the pendency of the suit the defendants failed to institute a suit as required by O. 21, r. 103. Thereupon an application was made to raise an additional issue as regards the conclusiveness of the order. An additional issue was accordingly raised and it was held that the suit not having been filed within a year from the date of the order, the order had become conclusive and the plaintiff was given a decree. The policy underlying the r. 103 of O. 21, is to have a speedy settlement of the questions of title raised in execution sales. But, is the institution of a suit under O. 21, r. 103, Civil Procedure Code, the only remedy for having the said order superseded? If the establishment of a right to the property is what is contemplated as necessary to supersede the order and I think it is, then if the unsuccessful party is able to get his right declared or established within a

1. (1881) I.L.R. 4 Mad. 302.
2. (1923) 75 I. C. 814.

Palaniappa Chettiar *v.* Ramaswami Servai.

year, in my opinion, the order must be held to have been superseded by the later adjudication. Otherwise, in spite of the adjudication in his favour, he must again file a suit to have his right to the property declared which a competent Court has already declared. As observed by the Privy Council in *Bassu Kuar* v. *Dhum Singh*[1] it would be an inconvenient state of the law if it were found necessary for a man to institute a perfectly vain litigation under peril of losing his property if he does not. It seems to me that such a vain litigation is not contemplated by the legislature. The use of the word "may" in r. 103 seems to suggest that what is contemplated is the establishment of a right and the remedy by a suit is indicated. But what makes the order conclusive is not the failure to institute a suit but the failure to have the right established. I am therefore of the opinion that it is not obligatory for the petitioner to institute a suit within a year from the 9th July, 1932, for establishing that the purchase by him in Court auction conferred a valid title to the property against the respondents. But the next question is, should the petitioner bring a suit for possession or can he file the present application under O. 21, r. 95, Civil Procedure Code, for delivery of possession of the property? It was found in the said O. S. No. 153 of 1929 that the mortgages on the footing of which the petitioner obtained a decree were executed for legal necessity and for purposes binding on the family, that the father and the brother of respondents 1 and 2 fully represented the family in the said transaction and in the mortgage suit and that respondents 1 and 2 are bound by the decree therein. (*Vide* paragraphs 39 and 40 of the judgment of the District Munsiff.) Therefore it must be taken that respondents 1 and 2 as members of the family were also parties to the said mortgage suit O. S. No. 31 of 1929 and decree therein and "not persons other than the judgment-debtor". *Prima facie* therefore the petitioner will be entitled to apply for possession under O. 21, r. 95. The question again is, is the prior application made by him a bar? It will be seen that in E.A. No. 203 of 1932 the learned Subordinate Judge in view of the then pending suit O. S. No. 153 of 1929 and on the invitation of the respondents refrained from going into the question whether respondents 1 and 2 are not bound by the decree. The order

---

1. (1888) L.R. 15 I.A. 211 : I.L.R. 11 All. 47 (P.C.).

Palaniappa Chettiar v. Ramaswami Servai.

on that petition must be deemed to have been made subject to the result of the litigation in O. S. No. 153 of 1929 and on the assumption that the respondents were not bound by the decree. Such an assumption is now found to be untenable in view of the decision in O. S. No. 153 of 1929. Under such circumstances the present application can be treated as a revival or continuation of the original application E. A. No. 118 of 1932. The principle stated by Sundaram Chettiar, J., in *Sundaramma* v. *Abdul Khadar*[1] would apply to the case:

> " Where the former execution application was dismissed finally but for some reason (not due to any default or neglect on the part of the applicant) which subsequently turned out to be untenable, the later execution application would be deemed to be one for a revival of the former one ".

Such obstacle the petitioner had in getting delivery of possession now having been removed by virtue of the adjudication of O. S. No. 153 of 1929, the present application is therefore competent and the petitioner is entitled to get delivery of possession from respondents 1 and 2. I therefore reverse the order of the lower Court and direct delivery of possession being given to the petitioner. In the circumstances I make no order as to costs.

S. V. V. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

S. M. Moosa Sahib .. *Appellant* in Appeal No. 152 of 1936 and Petitioner in C.R.P. No. 465 of 1936 (1st Defendant)*

v.

Darisa Subbamma and another .. *Respondents in both (Plaintiff and 2nd Defendant).*

Moosa Sahib v. Subbamma.

Civil Procedure Code (V of 1908), O. 1, r. 10—Suit by plaintiff for recovery of money—Commissioner appointed to settle accounts between defendants—Agreement by the defendants to abide by any finding of Commissioner regarding payment of money—Finding that money was due to second defendant by first defendant—Attempt to resile from agreement—Agreement could be enforced—Decree how to be passed—Transposition of second defendant as second plaintiff—Whether proper.

---

1. (1932) 64 M.L.J. 664: I.L.R. 56 Mad. 490 (503) (F.B.).

* A.A.O. No. 152 of 1936 & C.R.P. No. 465 of 1936. 4th February, 1937.

Moosa Sahib *v.* Subbamma.

The second defendant, the son of the plaintiff was the agent of the first defendant. The second defendant used a sum of money belonging to his mother, the plaintiff, for the business of the first defendant and the plaintiff brought the suit against her son and his principal for recovery of the amount. Since the first defendant objected to the maintainability of the suit on the ground that it was really a matter between himself and the second defendant and that there was no privity of contract between him and the plaintiff, a petition was put in by plaintiff for the appointment of a Commissioner to settle the accounts of defendants and the defendants endorsed this application with a statement that each of them would be willing to pay the other whatever was found due when accounts were settled and that the Court might pass a decree on those lines. The Commissioner so appointed sent a report that a certain amount was due by first defendant to second defendant. The Court found difficulty of granting a decree in favour of somebody who was not a plaintiff. A petition was therefore put in by plaintiff to transpose the second defendant as second plaintiff. The first defendant attempted to resile from the agreement.

Held, (1) that the first defendant should not be allowed to resile from the agreement entered into freely by him to pay whatever might be found by the Commissioner to be due and to avoid having the debt embodied in a decree.

Although the procedure adopted is not contemplated by the Procedure Code it has been recognised constantly by Courts.

Makudam Mohammad v. *Mohammad Sheik Abdul Kadir*, (1936) 71 M.L.J. 281, relied on.

(2) That though under ordinary circumstances such a transposition of parties as claimed was not proper, still considering the special circumstances of the case, the first defendant by his agreement impliedly agreed to such changes being made in the nature or frame of the suit as to give effect to the finding of the Commissioner and for the Court doing justice in the case.

A. A. O. No. 152 of 1936.

Appeal against the order of the Court of the Subordinate Judge of Cuddappah dated the 28th November, 1935 and made in A.S. No. 95 of 1935 (A.S. No. 50 of 1935, District Court, Cuddappah) preferred against the decree of the Court of the District Munsiff of Nandalur in O.S. No. 94 of 1934.

C. R. P. No. 465 of 1936.

Petition under Ss. 115 of Act V of 1908 and 107 of the Government of India Act, praying the High Court to revise the order of the Court of the Subordinate Judge of Cuddappah in A. S. No. 95 of 1935 (A. S. No. 50 of 1935, District Court, Cuddappah) preferred against the decree of the Court of the District Munsiff of Nandalur in O. S. No. 94 of 1934.

P. Govinda Menon for *B. Poker* for Appellant.

Kasturi Seshagiri Rao for Respondents.

The Court delivered the following

JUDGMENT.—The second defendant, the son of the plaintiff, was a servant or agent of the first defendant. The second

Moosa Sahib *v.* Subbamma.

defendant used a sum of money belonging to his mother for the purpose of the business of the first defendant; and the plaintiff brought this suit against her son and his principal to recover this sum. It appeared from the accounts of the first defendant kept with the second defendant that the account of the second defendant with the first defendant was credited with this amount. That first defendant objected to the maintainability of the suit on the ground that it was really a matter between himself and the second defendant and that there was no privity of contract between him and the plaintiff. On the 10th August, 1934, the plaintiff put in a petition for the appointment of a Commissioner to settle the accounts of defendants 1 and 2, as she was willing to take whatever was found due on accounting. Both the defendants endorsed this application with a statement that they had no objection to the appointment of a Commissioner and that each was willing to pay the other what might be found due from the one to the other upon account being taken, and that the Court might pass a decree for the amount found due. A Commissioner was appointed and he sent in a report to the Court to the effect that a certain sum of money was due by the first defendant to the second defendant on accounts. The Court was then faced with the difficulty of granting a decree in favour of somebody who was not the plaintiff. A petition was therefore put in by the plaintiff to transpose the second defendant as second plaintiff. An objection was raised on the ground that O. 1, r. 10 did not apply, and that therefore no such transposition could be made. The first defendant attempted to resile from the agreement and the Court went on with the trial as if no agreement had taken place. In appeal the Subordinate Judge came to the conclusion that this agreement ought to have been supported by the Court and that the District Munsiff should have transposed the second defendant as second plaintiff, if necessary for the ends of justice. He therefore remanded the suit for fresh disposal on the basis of the agreement.

There can be no doubt at all that the first defendant should not be allowed to resile from the agreement entered into freely by him to pay whatever might be found due by the Commissioner and to avoid having that debt embodied in a decree. Although the procedure adopted is not contemplated by the Procedure Code, it has been constantly recognised by Courts.

One case in which such an agreement was upheld is reported in *Makudam Mohammad* v. *Mohammad Sheik Abdul Kadir*[1] in which Pandrang Row, J., referred to English and Indian decisions and held that by the agreement the Court became an arbiter and that if the parties agreed to accept the arbitration of the Court they were bound by it even though the procedure of the Court was *extra cursum curiae* and not contemplated by the Procedure Code.

The real difficulty in this case is due to the fact that the amount is found due in a suit brought by the plaintiff for a sum of money due to the second defendant as a result of account taking between the first defendant and the second defendant. It is quite true that O. 1, r. 10 will not in terms apply to a case of this kind; and if there had been no agreement between the parties the District Munsiff would undoubtedly have been justified in refusing to transpose the second defendant as second plaintiff. Notwithstanding the other provisions of the Procedure Code, it is always the policy of the Court to enforce, if possible, any agreement entered into between the parties; and in special circumstances where a grave injustice would be done if the Court did not exercise its inherent powers, I have no doubt that the Court is entitled under S. 151, Civil Procedure Code, to do justice by giving effect to the agreement of the parties. When the first defendant agreed to pay the second defendant or plaintiff such sum as might be due on taking accounts, he impliedly agreed to such changes being made in the nature or frame of the suit as to give effect to the finding of the Commissioner. I therefore agree with the lower appellate Court that the learned District Munsiff was wrong in allowing the first defendant to resile from the agreement and in refusing to pass a decree in terms of the report of the Commissioner.

It is argued that the agreement entered into would not comply with the provisions of O. 23, r. 3, which requires a decree to be passed only so far as the agreement relates to the suit. I do think there is much force in this objection because the suit related to a sum of money lent by the plaintiff to the first defendant through her son, and the object of the inquiry by the Commissioner was to ascertain whether the whole of that sum or if not what part of it, was payable to the plaintiff.

1. (1936) 71 M.L.J. 281.

Moosa Sahib v. Subbamma.

The order of the appellate Court is not that the decree should be passed in terms of the Commissioner's report, but merely that a decree should be passed in the light of its remarks that the agreement was a valid one and that there could be no objection to the transposition of the parties if necessary in the interests of justice. That was a correct order. This appeal is therefore dismissed with costs.

Leave is granted.

A Civil Revision Petition has also been filed by way of caution. The C.R.P. is unnecessary and is dismissed; but in view of the fact that costs have been awarded in the Civil Miscellaneous Appeal there will be no order as to costs.

K.C. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING.

Ayitham China Suryarao .. *Petitioner* (Plaintiff)*

v.

Maddala Suryachandra Rao, Minor by mother and guardian Ramanamma .. *Respondent (Defendant).*

China Suryarao v. Suryachandra Rao.

Registration Act (XVI of 1908), Ss. 17 and 49—Hindu joint family—Partition lists not registered—Partition to be proved to show necessity for a promissory note—Inadmissible in evidence—Oral evidence also not permissible in the face of S. 91, Evidence Act.

In a partition, in order to equalise shares of the members of the family, it was arranged that P. W. 3, a member, should pay off all family debts and that the other two members should execute promissory notes respectively for the amounts due from them. Accordingly the defendant's mother as guardian of the minor defendant executed the suit note in favour of P.W. 3 who transferred it to the plaintiff. In a suit on the note the main defence was that the minor was not liable on the note. In order to meet it the plaintiff had to prove the necessity for the note and for that he called P.W. 3 to speak to the partition. The Court found the partition lists inadmissible in evidence.

Held, (1) that since it was necessary for the partition lists to be registered, they could not be received in evidence unless they satisfied one of the conditions of Proviso to S. 49 of the Registration Act.

This is not a case where the plaintiff can take advantage of S. 53-A of the Transfer of Property Act, for that section relates only to the retention of immovable property of which P.W. 3 might be in possession. Nor can a promise to pay under the note be called a 'collateral transaction'. It is obviously one of the terms of the partition itself and *Samuvier* v. *Ramasubba Aiyar*, (1931) 60 M.L.J. 527: I.L.R. 55 Mad. 72 and *Bhabi Dutt* v. *Ramalalbyamal*, A.I.R. 1934 Rang. 303, are clear authority for the position that though plaintiff's claim is a claim for money only, if it is part of

* C. R. P. No. 562 of 1935. 2nd March, 1937.

China Suryarao v. Suryachandra Rao.

an agreement which affects immovable property and that agreement must be regarded as 'an indivisible whole to effect a fair distribution of the assets', the plaintiff cannot be permitted to tender his unregistered document in evidence.

(2) That in the face of S. 91 of the Evidence Act, no oral evidence could be allowed to be tendered regarding the terms of the partition.

Petition under S. 25 of Act IX of 1887, praying the High Court to revise the order of the Court of the Subordinate Judge of Narasapur dated the 21st day of December, 1934 and made in S.C.S. No. 123 of 1934.

V. Viyyanna for Petitioner.

V. Suryanarayana for Respondent.

The Court delivered the following

JUDGMENT.—The minor defendant in this case with his mother as guardian, and his two uncles, one of whom is Narasimhamurti, P. W. 3, effected a partition of their immovable property in October, 1930. As one of the terms of that partition, and in order to equalise the shares of the three members of the family, it was arranged that P.W. 3 should pay off all the family debts and that the other two should execute promissory notes in his favour for Rs. 1,500 and Rs. 700, respectively. Accordingly defendant's mother executed the suit promissory note in favour of P. W. 3 for Rs. 700 on the same day. This note was transferred by P. W. 3 to the plaintiff, who has now sued the defendant upon it.

The main defence raised was that the minor defendant is not liable upon the pronote. In order to meet that defence it was necessary for plaintiff to prove that the pronote was executed for necessity. To prove this he called P. W. 3, who spoke to the terms of the partition. In cross-examination he admitted that there were unregistered partition lists in existence. The lower Court held that these lists were inadmissible in evidence and consequently that there was no valid partition, no valid debt binding upon the defendant. Against this decision plaintiff has filed the present Civil Revision Petition.

I am unable to agree with the language in which the lower Court has formulated its decision. It is well settled, that there can be a valid partition without any document at all. (See *Ram Gopal* v. *Tulshi Ram*[1].) But the real question is whether plain-

1. (1928) I.L.R. 51 All. 79 (F.B.).

China Suryarao *v.* Suryachandra Rao.

tiff is debarred from proving the terms of this partition once the existence of the unregistered partition-lists is established. If he cannot prove those terms, he cannot prove the necessity for the defendant's guardian to execute the pronote and he must fail. Not without reluctance I have come to the conclusion that the lower Court's decision is right.

I have had a translation of one of the partition-lists before me and it is obvious from it, indeed it was not seriously challenged by petitioner's learned advocate that it is a document which requires registration under S. 17 of the Registration Act. Under S. 49 it cannot therefore be received in evidence unless it satisfies one of the conditions of the proviso. This is not a case in which plaintiff can take advantage of S. 53-A of the Transfer of Property Act, for that section relates only to the retention of immovable property of which P. W. 3 or plaintiff might be in possession. Nor do I see how the promise to pay Rs. 700 can be called a 'collateral transaction'. It is obviously one of the terms of the partition itself and *Samuvier* v. *Ramasubba Aiyar*[1] and *Bhabi Dutt* v. *Ramalalbyamal*[2] are clear authority for the position that though plaintiff's claim is a claim for money only, if it is part of an agreement which affects immovable property and that agreement must be regarded as 'an indivisible whole to effect a fair distribution of the assets' (to quote from *Samuvier* v. *Ramasubba Aiyar*[1]) plaintiff cannot be permitted to tender his unregistered document in evidence.

Plaintiff being thus unable to tender the partition-list in evidence, is next confronted with S. 91 of the Evidence Act which lays it down in unmistakable language that he cannot also tender any oral evidence of the terms of the partition. The result is that he can give no evidence at all of those terms and cannot prove any necessity for the execution by defendant's guardian of the pronote. This Civil Revision Petition must accordingly be dismissed with costs.

K. C. —— *Petition dismissed.*

---

1. (1931) 60 M.L.J. 527: I.L.R. 55 Mad. 72.
2. A.I.R. 1934 Rang. 303.

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VARADACHARIAR, MR. JUSTICE BURN AND MR. JUSTICE PANDRANG ROW.

Arumugham Chetti (deceased) and others .. *Appellants** (*1st Deft. and Nil*)

v.

Y. Pr. K. R. V. Subramaniam Chetti and others .. *Respondents* (*Plaintiffs 2 to 4*).

F.B.

Arumugham Chetti *v.* Subramaniam Chetti.

Transfer of Property Act (IV of 1882), S. 105—Grant of a village to a junior member by the holder of an impartible estate for maintenance— Poruppu *payable by the junior member—*Poruppu, *meaning of—If grant a lease—Oral grant, if valid—Lease—Possession with lessee—Stranger trespassing—If and when adverse to lessor—Landlord and tenant—Estoppel—Evidence Act, S. 116—Lease from* A*—Discovery that* A *not entitled to the property—Lease from* B, *the real owner—No possession taken under* A's *lease—If estops lessee from pleading that* A *had no title.*

In 1880, the then Zemindar *D* granted a lease Ex. A of the suit villages for a period of 15 years from Fasli 1290, *i.e.*, from 1st July, 1880 to 1st July, 1895. The lessees assigned the lease in 1882 to *D's* wife, who in turn conveyed it in 1883 in favour of *V*, a junior son of hers. In 1886, *V* assigned it to *K*. In 1882, *D* executed a will under which he provided for each of his junior sons being given a village capable of yielding Rs. 1,200 per annum for their maintenance because being an impartible estate the eldest alone succeeded to the estate and was under obligation to maintain the junior members. The balance income from the village was to be settled as *poruppu* payable by the grantee to the Zemindar. *D* died in 1883 and was succeeded by his eldest son *U*. As the estate was heavily indebted, *U* granted a lease of the Zemindari in 1887 under Ex. I to an European Syndicate receiving an advance of Rs. 17 lakhs from them; the said advance was to be liquidated by their enjoying the Zemindari for a fixed period. As the syndicate insisted on the junior brothers joining in the deed, a family arrangement was entered into carrying out the desires of the father *D*. In pursuance of that the suit villages were then granted to *V* on a perpetual lease on payment of a *poruppu* of Rs. 800 per annum to the estate, as the village was expected to yield over Rs. 2,000. The lease (Ex. B) provided that the leases given to the uterine brothers should not be interfered with by the European lessees so long as those leases continued, beyond collecting the *poruppus* already fixed on their respective leases. *V* died some months later and in April, 1889, *V's* widow *N* as guardian of her minor children granted a lease Ex. D to *K* to commence after the expiry of the first lease Ex. A for a further period of 14 years (*i.e.*, from 1st July, 1895 to 1st July, 1909) receiving Rs. 500 without any liability to pay future rents to her or her sons. She died in 1889 and then misunderstandings arose between the Zemindar *U* and *V's* branch. Therefore when the term under Ex. A ended, *U* tried to get possession of the villages for the benefit of his daughter, ignoring the perpetual grant made by him to *V* in 1887. If the 1887 grant were to be ignored, the European lessees would be entitled to the villages and so *K* got from them a lease Ex. I in 1895 in the name of his brother *S* to check-mate the Zamindar. The Zemindar then bought off *K* and got from him an assignment of Ex. I in the name of his daughter *Ve* (Ex. I-A) and an assignment of Ex. D in the name of his servant *Kr.* (Ex. D-3) also for the daughter's benefit and took possession of the villages. In 1901, *Ve* usufruc-

*Appeal No. 103 of 1925. 26th November, 1936.

F.B.

Arumugham Chetti v. Subramaniam Chetti.

tuarily mortgaged these villages to the first defendant. The plaintiff got a sale of these villages from *S* (son of *V*) who became solely entitled to them and filed this suit in 1919 for recovery of the villages on the ground that *Ve* and her mortgagee were only entitled to remain in possession until 1909, and that even if the perpetual grant was not true, the defendants cannot dispute the title of *N* and her sons inasmuch as *K* their predecessor-in-title got a lease from them of the suit villages under Ex. D. The defendants contended (1) that the perpetual grant of 1887 was a lease and invalid being oral; (2) that the title, if any, of the plaintiff and his assignor had been extinguished by adverse possession on the ground that *Ve* and first defendant have all along ignored the right of *K* and the plaintiff's assignor *S*.

Held, by the Division Bench :—

(1) that possession by a stranger should not be held adverse to the lessor as long as there is a term outstanding and even if it could be held to be adverse when the stranger dispossessed the tenant in possession and continued in possession adverse to the lessor and also to the knowledge of the lessor, that can only be if there had been a trespass against or unlawful interference with the tenant's possession. But here *Ve* had acquired the right of the tenant *K* under Ex. D-3 and as such till 1909 there was no right in plaintiff's predecessors-in-title to sue to eject her and as such there is no question of title by adverse possession as the suit is filed within 12 years of 1909.

(2) Assuming that the perpetual grant is invalid, the defendant is not estopped from disputing plaintiff's title in the circumstances. It is only so long as the tenancy is subsisting and he is in possession under the lease that a tenant cannot set up the title of a third person but where before the lease is to take effect, the lessee discovers that the lessor had no title and takes a new lease from the real owner and enters into possession thereunder, he is not estopped from denying the first lessor's title. The lessee *K* may plead that he took Ex. D under a mistake as to his lessor's title or he may plead a constructive eviction by the European lessees as true owners and it is not necessary for it that he should actually surrender possession which he obtained, not under the lease Ex. D but under the very first lease Ex. A.

Alaga Pillai v. *Ramaswami Thevan*, (1925) 49 M.L.J. 742, followed.

Also *Ve* and her representatives only claimed under the European lessees and acquired an assignment of *K's* lease only as a possible weapon of defence against *K's* lessors.

The Division Bench referred to a Full Bench the other question as to whether a transfer of the right to enjoy immovable property in perpetuity made by the holder of an impartible Zamindari to a junior member on terms, or in pursuance of an arrangement, that the junior member will give up all claims for present or future maintenance and will pay annually to the Zamindar a sum of money is a lease within the meaning of S. 105 of the Transfer of Property Act or should be regarded as a family arrangement.

Held, by the Full Bench that the transaction in question is not a lease but only a family arrangement and hence valid, though oral. Maintenance was part of the 'consideration' for the transfer and not only 'motive' for the transfer. The *poruppu* was not the consideration for the transfer but only represented the excess income from the villages over what was intended as maintenance provision. The transaction was not intended by the parties to be a lease nor was it a lease.

Per *Burn, J.*—The answer to the question will vary in accordance with the circumstances of each case.

Meaning of '*Poruppu*' discussed.

Zamindar of Polavaram v. *Maharajah of Pittapur*, (1936) 71 M.L.J. 347: L.R. 63 I.A. 304: I.L.R. 59 Mad. 910 (P.C.), distinguished.

Appeal against the decree of the Court of the Additional Subordinate Judge of Sivaganga in O. S. No. 10 of 1923 (O. S. No. 12 of 1920 on the file of the Court of the Subordinate Judge of Sivaganga).

The following is a detailed summary of the facts taken from the earlier portion of the judgment of Varadachariar, J.:—

This is an appeal by the first defendant against a decree directing delivery of possession, to the plaintiffs of a village called Kiranur in the Sivaganga zamindari and payment of mesne profits. The plaintiffs claimed title either as lessees or as purchasers from one Singa Dorai to whose father it is alleged this village was given by a former Zamindar absolutely on a perpetual lease, by way of maintenance, as the result of a family arrangement shortly before the whole zamin was leased to certain European lessees in May, 1887. The first defendant claimed to be in possession of a usufructuary mortgage from the Zamindar's daughter Vengu Nachiar who, in turn, claimed to have acquired the rights of one Sivachidambara under a term lease granted by the European lessees, to enure up to the middle of 1918. By another transaction which, the plaintiffs allege, was entered into by the Zamindar on behalf of the said Vengu Nachiar, a leasehold interest created by the plaintiff's predecessor-in-title and enuring only up to the middle of 1909 had been acquired by the Zamindar; and the present suit was instituted in December, 1919, on the footing that the European lessees had no power to grant the lease relied on by the first defendant and that the first defendant by virtue of his claim under Vengu Nachiar was entitled to remain in possession only up to the middle of 1909, under the other lease. The first defendant contested the truth and validity of the permanent lease arrangement set up by the plaintiff, insisted on the validity of the lease granted by the European lessees and also raised pleas of adverse possession and *jus tertii*. The plaintiffs in turn contended that the first defendant was estopped from disputing the right set up by plaintiff in himself and his predecessors-in-title.

Prior to 1887, the Sivaganga zamindari was held by Rani Katama Nachiar and she had made numerous alienations by way of permanent leases and term leases. In a dispute as to whether her own children or her elder sister's son was to succeed to the zamindari, the latter, named Doraisinga Thevar, was held entitled to succeed. As many of the zamin villages were in the possession of alienees, the new Zamindar had to take steps to recover possession thereof, and he found it convenient to create new leases, presumably on favourable terms, and leave it to his lessees to institute suits against Rani's alienees. One such lease by the new Zamindar was Ex. A relating to the suit village. It was for a

F.B.

Arumugham Chetti *v.* Subramaniam Chetti.

period of fifteen faslis from the 1st of July, 1880, and provided for payment of Rs. 800 per annum to the Zamindar. This leasehold interest was assigned to the Zamindar's wife by Exs. A-1 and A-2 in 1882; and in 1883, the Zamindar's wife made a grant of this interest to one of her junior sons by name Vadugayya Thevar. By Ex. A-3 dated 13th February, 1886, the remaining term of this lease was assigned by Vadugayya to one Krishnan Chetti of Sivaganga. It was for a cash consideration of Rs. 700 and the assignee was directed to pay to the Zamindar the rent of Rs. 800 per annum reserved under the original lease. It was also provided that on the expiry of the lease, *i.e.*, at the commencement of fasli 1305, the assignee should give up possession of the village to the Zamindar. Krishnan Chetti accordingly continued in possession down to the 30th of June, 1895.

The Zamindar who granted the lease under Ex. A had five sons, the eldest of whom would succeed to the zamindari in due course. Being anxious to make proper provision for the maintenance of the other sons, the Zamindar executed a will Ex. N on the 21st July, 1882.

It would appear from Ex. N that at that time the sons were being given every month whatever was required for their maintenance and the will provided that this practice should continue unless any of the sons was unwilling so to receive. In that contingency, the will directed that a village called Tiruvalur should be given to Vadugayya Thevan for his maintenance and other villages were similarly indicated for the other sons. The Zamindar's idea was that each of the sons should be in a position to get about Rs. 100 a month from the villages to be granted to them, but as the villages might yield not exactly that amount but something more as net income, it was suggested that out of the net income, Rs. 1,200 per annum should be deducted as for maintenance and the balance settled as *poruppu* payable by the grantee to the Zamindar. The will provided for a larger provision being made when the zemindari came to a good condition.

Though the will contemplated Tiruvalur being given to Vadugayya Thevar only after the testator's death, he seems to have preferred to make the grant in his own lifetime and accordingly executed Ex. 19 (*b*) on the 11th August, 1882. It is described as a perpetual lease at Rs. 900 per fasli. The grantee is directed to recover possession at his own cost from Katama Nachiar's alienees and to hold the village from son to grandson and so on with powers of alienation by gift, sale, etc. The amount of Rs. 900 is made up of Rs. 693-2-6 for rent and Rs. 296-13-6 for probable road-cess. In January, 1883, the same Zamindar made further

provision for Vadugayya Thevar by Ex. 19 (*c*) which is described as a permanent lease of Thavasikudi at a rental of Rs. 74 made up of Rs. 50 being guthagai (or rent) and Rs. 24 road-cess. The other terms are similar to those in Ex. 19 (*b*) and it may be mentioned that both Exs. 19 (*b*) and 19 (*c*) purport to have been given on account of the grantor's affection for the grantee.

The Zamindar Doraisinga Thevar died in July, 1883 and was succeeded by his eldest son Periaswami *alias* Udayana Thevar. The efforts which were made to raise a loan of a large sum of money on favourable terms so as to conveniently discharge the numerous debts owing from the estate resulted in the arrangement commonly spoken of as the European lease, whereby a European syndicate advanced a loan of about 17 lakhs to the Zamindar on condition that it should be liquidated by their enjoying the zamindari for a term of 22 years. This was subsequently extended by 10 years, in consideration of a further advance. As the law relating to the powers of the holder of an impartible estate was even then not considered free from doubt, the European lessees desired that the Zemindar's younger brothers should assure them that the lease arrangement would be accepted by the brothers as binding upon themselves. This circumstance is relied on by the plaintiff to show the reason and the occasion for the grant of the suit village to Vadugayya Thevan at this time. As already stated, the previous Zamindar had expressed a desire that Vadugayya should be given Rs. 1,200 per annum in addition to Tiruvalur. Judging from the road-cess of Rs. 24 provided for in Ex. 19 (*c*) Thavasikudi would not at that time have sufficed to secure anything like Rs. 1,200 to Vadugayya Thevan. Now that the eldest brother was giving away the whole zamindari to the European lessees for a long term, it was only natural that Vadugayya should have claimed a further provision for himself; and the requisition of the European lessees that all the brothers should join in assuring the validity and binding character of the lease would have given him a convenient opportunity for insisting upon his claim being satisfied.

The scheme of Ex. B-2, the European lease, was that the lessees should enjoy the whole zamindari, but by cl. (25) it was provided that:

> "The leases given to the uterine brothers, etc., of the Zamindar mentioned in Schedule C are not to be interfered with by the (European) lessees beyond collecting the *poruppus* or rent already fixed on their respective leases".

Schedule C is headed "List of Pannai lands, etc., allotted Villagewar and Endalwar, for the maintenance of the relatives" of the Zamindar; and in that schedule against Vadugayya's name

F.B.

Arumugham Chetti v. Subramaniam Chetti.

the suit village Kiranur is mentioned in addition to Tiruvalur and Thavasikudi. Their Lordships find after discussing the evidence that the suit village of Kiranur was granted to Vadugayya Thevar on the terms alleged in para. 6 of the plaint which is as follows:—

"According to the aforesaid family arrangement the aforesaid village of Kiranur, etc., were granted absolutely on perpetual lease to the aforesaid Vadugayya Thevar. Under the said family arrangement, the said Vadugayya Thevar, his heirs and assigns should enjoy the aforesaid Kiranur village . . . . . and were bound to pay to the said Zamindar the annual *poruppu* of Rs. 800 fixed for the said village as well as the road-cess alone".

Vadugayya's widow died somewhere about 1889 and the Zamindar applied to get himself appointed as guardian of the person and property of the three minor sons of Vadugayya. For some reason this attempt was resisted by the maternal relations of the minors, and a maternal uncle (P.W. 10) and a stranger were ultimately appointed guardians. This possibly caused some chagrin to the Zamindar. Therefore when the term under Ex. Z came to an end in June, 1895, the Zamindar tried to enter upon possession of this village. Even if the permanent grant of the village to Vadugayya were not true, it will be the European lessees that would have been entitled to deal with it, as cl. (25) of their lease limited their rights in the suit village only so long as the lease to Vadugayya's branch continued. The Zamindar could not therefore openly assert his rights and hence he began to persuade some of the ryots in the village to side with him and execute a muchilika (Ex. II), purporting to act on behalf of all the ryots. The correspondence that passed between him and the village officers at this time shows that he sought their aid in reducing the village into possession. Krishnan Chetti, who, for a small consideration, had obtained under Ex. D (lease-deed in his favour by Vadugayya's widow on behalf of her minor sons) the right to continue in possession for 14 years from July, 1895, was shrewd enough to know the weak point in the Zamindar's case, and he managed to get from the European lessees a lease (Ex. I) in the name of his natural brother Sivachidambara Chettiar to checkmate the Zamindar in his attempt to take possession of the village. As Krishnan Chetti had thus armed himself with Ex. I, the Zamindar who dared not assert any claim as against the European lessees had to come to terms with Krishnan Chetti. Hence Krishnan Chetti on the one side and the Zamindar acting in the interests of and for the benefit of his daughter Vengu Nachiar on the other side brought about 4 documents of which only two, Ex. I-A and Ex. D-3 are necessary to be noticed for the present purpose. Ex. I-A is an assignment of Ex. I by Sivachidambara to Vengu Nachiar and Ex. D-3 is a transfer by Krishnan Chetti to Krishna

Raju, a servant of the Zamindar, of the lease Ex. D executed in favour of Krishnan Chetti by Nachiar Ammal, widow of Vadugayya Thevar. Krishnan Chetti received Rs. 7,500 as consideration for all these documents and left the field free for the Zamindar. These transactions appear to have been intended from the beginning for the benefit of his daughter Vengu Nachiar.

But it is not possible to say if ever she got directly into possession or management. The zamindari accounts filed in the case suggest that the acual management of the village was looked after by the Zamindar's men. In a written statement filed by Vengu Nachiar in January, 1913 (Ex. P) she stated that the Zamindar gave this village to her *permanently* in September, 1898, but the acquisition under Ex. D-3 as well as under Ex. 1 (*a*) was only of a short-term interest and this is all that she purported to mortgage under Ex. III (1901) to the first defendant and his elder brother. For certain reasons care was taken in Ex. III to refer only to the right obtained by her under Ex. 1 (*a*) and not to the right under Ex. D-3. It is not disputed that the first defendant has been in possession since the date of Ex. III. After the institution of this suit he obtained from the Court of Wards, acting on behalf of the present Zamindar, a fresh lease of the suit village under Ex. IV for a term of 13 years; but it is unnecessary to make any further reference to this transaction as it cannot affect the determination of the suit.

The questions raised on these facts appear from the judgment of Varadachariar, J.

Advocate-General (*Sir A. Krishnaswamy Aiyar*) and *V. Ramaswamy Aiyar* for Appellants.

T. M. Krishnaswamy Aiyar and *V. Subramania Aiyar* for Respondents.

The Court (*Stone* and *Varadachariar, JJ.*) made the following

ORDER OF REFERENCE TO A FULL BENCH.

Stone, J.

Stone, J.—This appeal raises a question of some considerable difficulty and general importance and a number of questions, largely of fact, which are only of importance to the present case. My learned brother and I are of the opinion that the first question should be referred to a Full Bench and we therefore formulate the question to be considered and state the facts and the points that appear to arise as leading up to it.

The policy underlying the Transfer of Property Act appears to be not to require a transfer of property to be in any

F.B.
—
Arumugham Chetti *v.* Subramaniam Chetti.
—
Stone, J.

particular form except in those cases in which the Act expressly requires the transfer to be in writing. (*See* S. 9.)

One kind of transfer so required to be in writing is, subject to certain exceptions, a lease of immovable properties.

The term "lease" is a term having a very definite meaning in English law and a meaning by no means the same as "lease" as used in the Transfer of Property Act. In considering whether a transaction requires, as being a "lease", to be in a particular form, *i.e.*, in writing, one has therefore not to have in mind whether it is a "lease" in the English law sense but whether it is a "lease" as defined by S. 105 of the Transfer of Property Act.

That section is worded as follows:—

"A lease of immovable property is a transfer of a *right to enjoy* such property, made for a certain time, express or implied, *or in perpetuity*, in consideration *of a price paid or promised*, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms."

The transferor is called the lessor, the transferee is called the lessee, *the price is called the premium and the money*, share, service *or other thing to be so rendered* is called *the rent.*

I have italicised the words that raise some of the difficulties.

With the above may be contrasted the definition of a "sale" contained in S. 54.

"Sale" is a transfer *of ownership* in *exchange* for a *price* paid or promised or part-paid and part-promised.

It will be noticed that elsewhere in the Transfer of Property Act when speaking of transfers by way of "sale" of "immovable property" the terms "buyer" and "seller" are used. These terms in English jurisprudence are usually restricted to the transaction of sale of goods, the terms vendor and purchaser being applied to sales of land. In other particulars it may be that the terminology of the Transfer of Property Act is different from that adopted in English law.

In this present case one is concerned with the following facts:—

The property in question belonged at all material times to an impartible zamindari.

F.B.

Arumugham Chetti *v.* Subramaniam Chetti.

Stone, J.

The Zamindar made an oral grant of a village, part of the said zamindari, to a junior member.

Under the Hindu Law relating to impartible estates junior members of an impartible zamindari have very restricted rights. One such right is the right to maintenance. At one time (indeed at the time of the oral arrangement here in question) it was thought that the Zamindar's powers of alienation were restricted. Decisions have since considerably modified the law as it was thought to be in the eighties of last century. Those decisions were considered recently by Ramesam, J., and one of us in *Ulagalum Perumal Sethurayar* v. *Subbulakshmi Nachiar*.[1]

The term of the above-mentioned oral grant was unlimited. It was a grant made in lieu of maintenance present or future. It was a grant which imposed an obligation upon the grantee, *viz.*, to pay annually a sum of Rs. 800.

It was a grant that conferred a benefit upon the grantee, *viz*, the right to enjoy a certain village, that is, the income thereof; that income, after the Rs. 800 had been paid, amounted in later years to Rs. 1,200 per annum.

The above are our conclusions of fact as to the terms of this oral arrangement. They are conclusions derived from inferences and such inferences are largely based upon the probabilities of the case rather than upon evidence that can be wholly accepted or the words used in any conversations which transmitted from mouth to ear the terms of this arrangement.

It is impossible to say whether this arrangement was come to at one time, or whether the Zamindar was first pressed for maintenance and then agreed in consideration of that claim being given up to make a grant, on favourable terms, of the village and whether thereafter and in performance of that contract the suggested transfer was put forward by the Zamindar and accepted by the junior member, or whether the whole thing was settled at one time, the Zamindar agreeing to grant and the junior member agreeing to receive the right to enjoy the income from the village; the junior member in consideration thereof, giving up his claim to maintenance, present or future, and agreeing to pay Rs. 800 a year.

This uncertainty as to fact is mentioned because it may be thought to be material, in considering whether a *transfer* falls

1. (1935) 71 M.L.J. 1.

F.B.

Arumugham Chetti v. Subramaniam Chetti.

Stone, J.

within the Transfer of Property Act, to consider the transfer itself, not, it may be, the wider arrangement of which the transfer is one part. On the other hand it may be thought that in considering whether an arrangement falls within any of the defined terms, *e.g.*, the term "lease", one must look at the arrangement as a whole.

We therefore find that it is not proved that the grant was separately arranged, nor is it proved that the grant was not separately arranged. We infer that the grant was made following upon, or, alternatively, as an integral part of a family arrangement of the nature above indicated.

In *Immudipattam Thirugnana Kondama Naik* v. *Periya Dorasami*[1] the material facts, on the present point, were as follows:—

A Zamindar executed a usufructuary mortgage by way of lease for 19 years to one *R.C.* The debt increased. *R.C.* died leaving his heir one *L.C.* who made a new arrangement with the Zamindar, the Zamindar's brother and brother's son (the heir) and another son. The Zamindar was to receive a sum down (borrowed from *L.C.* and added to the debt), transfer the zamindari to the heir, and receive maintenance from him at Rs. 250 per annum. The mortgagee, in lieu of interest, took 18 villages on usufructuary mortgage, paying peishcush and road-cess to Government and maintenance at Rs. 270 per mensem to the Zemindar.

Thus the transaction appears to have been a family arrangement *plus* a settlement with a stranger mortgagee involving a usufructuary mortgage of part of the zamin to the mortgagee and the transfer of the whole of the zamin to an heir in return for maintenance to be paid partly by the mortgagee and partly by the heir.

It was assumed (page 384) that such a transfer must be by registered deed. The transfer in question (at page 384) would appear to be the transfer of the zamin to the heir.

In *Varada Pillai* v. *Jeevarathnammal*[2] one question was whether *A* a woman had disposed of the suit properties during her lifetime. She and *R*, another woman, were registered owners of two moieties and they jointly presented a petition

1. (1900) L.R. 28 I.A. 46: I.L.R. 24 Mad. 377 (P.C.).
2. (1919) 38 M.L.J. 313: L.R. 46 I.A. 285: I.L.R. 43 Mad. 244 (P.C.).

F.B.

Arumugham Chetti v. Subramaniam Chetti.

Stone, J.

to the Collector in which they recited that they had given away two villages as Stridhanam to *D* and asking for the villages to be transferred in the name of *D*. The petition concluded:

" The said (D) shall hold and enjoy them with power to alienate, etc."

The Collector granted the petition and registered the transfer accordingly.

The Privy Council observed at p. 249:

"It was not contended before the Board that the above transactions effected a valid gift of the property to D; for such a gift must, under S. 123 of the Transfer of Property Act, be made by registered deed."

In *Madam Pillai* v. *Badrakali Ammal*[1] it was held by a Full Bench of this High Court that a transfer of property by a husband to his wife to be enjoyed by her during her lifetime in discharge of future maintenance is not a gift or sale and may be made without writing.

This decision appears largely to turn upon the meaning given to the word "price" (*see* per Schwabe, C.J., at 617). A reference to the Oxford Dictionary will show that price has as its primary meaning " money, or the like-paid for something." " Payment" can be made partly in goods. *Saxty* v. *Wilkin*[2]. That decision seems to show that if the transfer though part of a family arrangement, had been of the ownership of property in return for a money payment, instead of in return for the relinquishment of a maintenance claim, it would have been a sale requiring to be in writing. In the present case a further difficulty arises owing to the fact that in S. 105 "price" and " money" are both used.

Kumaraswami Sastri, J., however, in that case raised the wider question, also now raised in this case, *viz.*, whether if the transaction is treated as a settlement of family affairs it need be in writing. He stresses the fact that partition under Hindu Law can be made without any document.

Coutts-Trotter, J., observes that 'a trained English lawyer would never use the word " price ", unless it be to connote something other than the frequently familiar phrase " valuable consideration ". The trouble we feel with this kind of reason is that the Transfer of Property Act is constantly using expressions that an English lawyer would not use in England, *e.g.*,

1. (1922) 42 M.L.J. 410: I.L.R. 45 Mad. 612 (F.B.).
2. (1843) 152 E.R. 954.

F.B.

Arumugham Chetti *v.* Subramaniam Chetti.

Stone, J.

buyer and seller of land. The reason may be to prevent English decisions which turn upon the use of words of art being applied in India where similar words have different meanings. Clearly "lease" in the Transfer of Property Act means something different from "lease" as used in the English law of landlord and tenant. In *Zamindar of Polavaram* v. *Maharaja of Pittapuram*[1] the Chief Justice and Curgenven, J., at pages 170, 171, 179 and 180, followed the above decision and adopted the meaning given to the word "price", Beasley, C.J., also relying on this point upon *Queen-Empress* v. *Appavu*[2] and upon *Samaratmal Uttamchand* v. *Govind*[3]. In *Made Gouda* v. *Chenne Gouda*[4], Odgers, J., cited with approval Napier, J.'s decision in Second Appeal No. 225 of 1920 where he considers the decision in *Girhi Rani Misrani* v. *Chandra Lal Kanth*[5]:

> "I know of no authority for the proposition that the formal requirements of the Transfer of Property Act can be avoided by calling a transaction by a particular name under the Hindu Law".

Odgers, J., had, however, there to consider a transfer quite different to anything here, the transfer being to a stranger, though part and parcel of a wider transaction involving partition between members of the family.

The other cases cited such as *Abhiram Goswami* v. *Shyama Charan Nandi*[6] and *Venkatachariar* v. *Rangasami Aiyar*[7] which deal with the difference between a conveyance of ownership and the grant of the right to enjoy in perpetuity and the existence of the incidents of leasehold terms in the latter case including that of forfeiture in the case of a perpetual lease do not carry the matter further.

There thus appears to be an almost complete absence of authority on the question. We put on one side the fact that the plaint speaks of a perpetual lease. One has to use some expression when speaking of an arrangement aud the question is not whether this transaction amounts to a lease in some sense but whether it amounts to a lease in the sense of the Transfer of Property Act.

We notice that in the case of the other grants by this Zamindar to junior members which are evidenced in writing

1. (1930) 60 M.L.J 56: I.L.R. 54 Mad. 163.
2. (1885) I.L.R. 9 Mad. 141.
3. (1901) I.L.R. 25 Bom. 696.
4. (1925) 49 M.L.J. 150.
5. (1912) 17 C.W.N. 62.
6. (1909) 19 M.L.J. 530: L.R. 36 I.A. 148: I.L.R. 36 Cal. 1003 (P.C.).
7. (1918) 36 M L.J. 532.

F.B.

Arumugham Chetti v. Subramaniam Chetti.

Stone, J.

the sum reserved is called *poruppu* and the terms of transfer suggest the grant of an absolute estate rather than the giving of a lease, *i.e.*, confer the power of sale. These other grants only appear as leases in that an annual payment is reserved. We have no reason to doubt that the oral arrangement was similar in nature.

In these circumstances we refer for the opinion of the Full Bench the following question:—

"Whether the transfer of the right to enjoy immovable property in perpetuity made by the holder of an impartible zamindari to a junior member on terms, or in pursuance of an arrangement, that the junior member will give up all claims for present or future maintenance and will pay annually to the Zamindar a sum of money amounts to a lease within the meaning of the Transfer of Property Act, so as to be without effect unless in writing registered, or whether such a transaction should be regarded as a family arrangement and, if so, whether it is effective though oral".

As to the remaining questions I have had the advantage of reading the judgment of my learned brother with which I agree and to which I have nothing to add.

Varadachariar, J.

Varadachariar, J. (after stating the facts).—On the facts above stated, it has been contended on behalf of the appellants that the title, if any of the plaintiff and his assignor has been extinguished by adverse possession, as Vengu Nachiar and the first defendant have all along ignored the alleged right of Krishnan Chetti and the plaintiff's assignor. On the other hand it has been contended on behalf of the respondent that even if the alleged permanent grant for maintenance should be held to be untrue in fact or inoperative in law, the plaintiff's assignor must be held to have acquired a title by adverse possession and that the first defendant is, in any event, estopped from denying the title of the plaintiff's assignor without surrendering possession. We are unable to accede to any of these contentions.

Dealing first with the appellants' contention it must at the outset be observed that there is a considerable body of authority to the effect that possession by a stranger should not be held to be adverse to a lessor as long as there is a term outstanding, because the lessor would not *prima facie* be entitled to sue for possession before the expiry of the term. (*See* the discussion in pages 1633 to 1636 of Mitra's Limitation, 6th Edition.) The observations in *Ambalavana Chetti v. Singaravelu Udayar*[1] must be understood in the light of the

1. (1912) M.W.N. 669.

F. B.

Arumugham Chetti v. Subramaniam Chetti.

Varadachariar, J.

fact that the lease in that case was one from year to year and not for a definite term (*see* page 681). Assuming however that a lessor could sue a stranger for possession and therefore the stranger's possession could become adverse to the lessor, in cases in which the tenant has been dispossessed by the stranger under a claim hostile both to the tenant and to the lessor, the facts of the present case will not suffice to attract the operation of that rule. Whatever the motives or intentions of the Zamindar might have been he preferred to acquire the rights of Krishnan Chetti even under Ex. D and was in that sense in possession as an assignee of the term. The fact that Vengu Nachiar was a party only to Ex. 1 (*a*) and not to D-3 and purported in Ex. III to claim only under 1 (*a*) and made no reference to D-3 cannot in law affect the true position. As already stated, it is clear from the documentary evidence, and the probabilities of the case that the rights under Ex. D as well as the rights under Ex. 1 were acquired by the Zamindar for the benefit of Vengu Nachiar and if any suit for possession had been instituted by Krishnan Chetti or the plaintiff's assignor against Vengu Nachiar or her assignees, it could certainly have been met by setting up the rights under Ex. D-3. The observations in *Periya Aiya Ambalam* v. *Shunmugasundaram*[1] and *Yamunabai Narayan* v. *Lagmanna Basanna*[2], could be invoked only if there had been a trespass against or unlawful interference with the tenants' possession and not where the tenants' rights are acquired by a third person.

In support of the plea of estoppel the respondent contends that Krishnan Chetti, who had taken Ex. D would be estopped from denying his lessor's title and that Vengu Nachiar being the real assignee under Ex. D-3, she and the first defendant claiming under her could be in no better position. In dealing with this question it must be remembered that the plea of estoppel is material only in the view that the alleged maintenance grant is not true and operative for otherwise the plaintiff can succeed on the title itself. If the grant is not true or operative in law, the title must in July, 1895, be deemed to have vested either in the Zamindar or in the European lessees. If Krishnan Chetti obtained possession under Ex. D and let the Zamindar or Vengu Nachiar into

---

1. (1913) 26 M.L.J. 140: I.L.R. 38 Mad. 903 (F.B.).
2. (1918) 52 I.C. 770.

possession under Ex. D-3, there will be considerable force in the plea of estoppel. The decisions of the Privy Council in *Bilas Kunwar* v. *Desraj Ranjit Singh*[1], *Currimbhoy & Co., Ltd.* v. *Creet*[2] and *Pandit Chandrika Prasad* v. *B. B. & C. I. Ry. Co.*[3] deal with such a case. The respondent relies upon the decision of the majority in *Venkata Chetti* v. *Aiyanna Goundan*[4] and contends that the rule of estoppel as between landlord and tenant is not limited to cases where the tenant is let into possession under a particular lease but may also apply to cases where a person executes a lease or otherwise attorns to a lessor. But the qualifications recognised by the learned Judges in that case clearly show that the rule cannot avail the respondent in the present case. Under Ex. A-3 Krishnan Chetti became the assignee of the rights under Ex. A and that was the lease by the Zamindar himself. Ex. A-3 therefore directed him to surrender possession to the *Zamindar* at the beginning of July, 1895. The initial estoppel if anything was thus in favour of the Zamindar and it might well be contended that Krishnan Chetti's duty was to surrender possession to the Zamindar or those *validly* claiming under him. Ex. D though executed in 1889 was to come into effect only from the 1st July, 1895, and if the permanent grant there asserted on behalf of Vadugayya's sons were true and valid, Krishnan Chetti could have continued in possession under it even after the expiry of the term under Ex. A. But on the assumption that the lessors under Ex. D had no title, the position would be that Krishnan Chetti had merely entered into a contract of lease under the mistaken impression that Vadugayya's sons had a title. When the time came for the lease to take effect he became aware that his lessors had no title and accordingly took Ex. 1 from the European lessees. There is one error in the judgment of the learned Subordinate Judge in this connection. He observes that Krishnan Chetti *attorned* to the sons of Vadugayya. As stated already, no rent was payable under Ex. D to the sons of Vadugayya and beyond the taking of Ex. D and its subsequent assignment by D-3, the record shows no other act which can be construed as amounting to an attornment by

1. (1915) 29 M.L.J. 335: L.R. 42 I.A. 202: I.L.R. 37 All. 557 (P.C.).
2. (1932) 64 M.L.J. 103: L.R. 60 I.A. 297: I.L.R. 60 Cal. 980 (P.C.).
3. (1935) 68 M.L.J. 552 (P.C.).
4. (1916) 31 M.L.J. 712: I.L.R. 40 Mad. 561 (F.B.).

F. B.

Arumugham Chetti *v.* Subramaniam Chetti.

Varadachariar, J.

Krishnan Chetti to Vadugayya's sons. The lease which Krishnan Chetti took under Ex. 1 from the European lessees naturally provided that on the expiry of its term he must give up possession to the Zamindar. In these circumstances there seems to be no scope for the application of the rule of estoppel as between Krishnan Chetti and Vadugayya's sons. He may well plead that he took Ex. D under a mistake as to lessor's title; at the worst, he may plead a constructive eviction by title paramount and it is immaterial that he did not actually surrender the possession which he obtained under A-3 and not under D. (See *Alaga Pillai* v. *Ramaswami Thevan*[1]).

But even assuming for the sake of argument, that there may be estoppel as between Krishnan Chetti and Vadugayya's sons; it does not necessarily follow that the same estoppel will bind Vengu Nachiar and those claiming under her. As stated already, care had been taken to make Vengu Nachiar a party only to Ex. 1-A under which the right obtained under the European lessees was assigned. The fact that as a possible weapon of defence the Zamindar, acting in the interests of Vengu Nachiar, took care to buy up a claim that Krishnan Chetti might have under Ex. D cannot be held to bring Vengu Nachiar into privity with Vadugayya's sons so as to create an estoppel between them. In D-3 the parties took care to say that Vadugayya was "said to be a lessee" of Kiranur. It may be that between July, 1895, and March, 1896, there was something like a scramble for possession between the Zamindar and Krishnan Chetti and the story now put forward on behalf of the defence that the Zamindar was in possession hostilely to Krishnan Chetti even before the date of D-3 and 1-A may not be wholly true. The lands were in the occupation of tenants and each was trying to collect such rent as he could. In this sense it may even be held that possession passed only in March, 1896, from Krishnan Chetti to the Zamindar or to Vengu Nachiar. But it is not correct to assume that Krishnan Chetti's possession between July, 1895 and March, 1896, was only in the character of lessee from Vadugayya's sons because he had also obtained Ex. 1 from the European lessees though in his brother's name. There is even less justification for assuming that Vengu Nachiar obtained

1. (1925) 49 M.L.J. 742.

F.B.

Arumugham Chetti *v.* Subramaniam Chetti.

Varadachariar, J.

possession in March, 1896, in a right traceable to the title of Vadugayya's sons as lessors notwithstanding the fact that she took care to obtain an assignment only of the rights under Ex. 1 and never claimed to rely on any title acquired under D-3. Pressed to its logical result, the respondents' argument would bind Vengu Nachiar and the first defendant by a twofold estoppel, one in favour of the plaintiff's assignor and the other in favour of the Zamindar and the European lessees; the question of title will thus in effect be set at large.

The plea of title by adverse possession put forward on behalf of the respondent also rests on the assumption that Vengu Nachiar and the first defendant must be deemed to have held possession from 1896 on behalf of Vadugayya's sons. For the reasons given in dealing with the question of estoppel, we are unable to accept this assumption and this claim of title in the plaintiff by adverse possession is accordingly untenable.

[His Lordship then deals with the appellant's plea of *jus tertii* and overrules it on facts. That portion is therefore omitted from the report.]

It remains to deal with one more question of law, raised on behalf of the appellants. It has been contended that even if the arrangement alleged in the plaint be true in fact, it is inoperative in law as it has not been embodied in a registered deed, as required by S. 105 of the Transfer of Property Act. The Court below has held and it has been maintained before us on behalf of the respondent that the arrangement, though subject to the payment of a *"poruppu"* is not a lease within the meaning of S. 105, because the maintenance of Vadugayya was the consideration therefor and the transaction is in substance a grant subject to a burden. In addition to *Madam Pillai* v. *Badrakali Ammal*[1] (relied on before the lower Court), respondents' learned counsel has drawn our attention to the decision in *Zamindar of Polavaram* v. *Maharaja of Pittapuram*[2] by way of analogy. The learned Advocate-General replies that even taking these decisions to be correct, they do not really touch the present question because the definition of a "lease" is not restricted to cases where a "price" is paid; he argues that the idea of making a provision for maintenance can at best only constitute the 'motive' for the arrangement

1. (1922) 42 M.L.J. 410: I.L.R. 45 Mad. 612 (F.B.).
2. (1930) 60 M.L.J. 56: I.L.R. 54 Mad. 163.

F. B.

Arumugham Chetti v. Subramaniam Chetti.

Varadachariar, J.

and if the parties chose to adopt a form of arrangement which falls within the definition of a 'lease' in the Transfer of Property Act, the forms prescribed by law must be followed. He relies on the fact that the plaint itself speaks of the interest in the nature of a perpetual lease; and the admitted reservation of *'poruppu'* is, according to him, indistinguishable from a reservation of 'rent', though it may be a favourable rent.

As we propose to refer this question to a Full Bench for an authoritative decision on the point which is bare of authority, it is not necessary to do more than to indicate some of the considerations that may bear on the decision of the question. It may not be correct to speak of "maintenance" only as a motive in this case. The grantor was the holder of an impartible estate and the grantee was his brother for whose maintenance the Zamindar was bound to make provision both as a matter of law and under the terms of his father's will. "Maintenance" would therefore be part of the "consideration" for the transfer and the question will therefore arise, on the analogy of the decisions in *Madam Pillai* v. *Badrakali Ammal*[1] and *Zamindar of Polavaram* v. *Maharaja of Pittapuram*[2] whether a transaction for which the 'consideration' is something in addition to the categories specified in S. 105 of the Transfer of Property Act will fall under that section. Further, that section speaks of a transfer "in consideration of" money paid or promised, etc., could it have been intended to apply to a transaction whose avowed purpose is the provision of "maintenance" and a *"poruppu"* is fixed apparently because the village set apart for the purpose yields more than the proposed maintenance amount? The provisions of Ex. N are significant in this connection, as showing that this is just the kind of arrangement that the father contemplated being made for the maintenance of the junior sons. Undue stress ought not to be laid on the description of the tenure, in the plaint and in some of the documents as a perpetual lease; the suit transaction was admittedly oral and could at the inception have borne no particular description. The description "perpetual lease" might have been used for want of any other compendious expression by which a tenure of the kind intended could be referred to. On the other hand paragraph 6 of the plaint

1. (1922) 42 M.L.J. 410: I.L.R. 45 Mad. 612 (F.B.).
2. (1930) 60 M.L.J. 56: I.L.R. 54 Mad. 163.

F.B.
Arumugham Chetti v. Subramaniam Chetti.
Varadachariar, J.

speaks of the village having been granted absolutely on perpetual lease; and when one turns to documents like Exs. XIX (*b*) and XIX (*c*) it will be noticed that the arrangement is stated to have been made on account of the great affection that the grantor bore to the grantee and the language of conveyance employed in these documents, *viz.*, that the grantee, his heirs and assigns should enjoy the village from son to grandson and so on, with powers of gift, sale, exchange, etc., with *Ashta Bhoga Dasa Swamya*, etc., treasures, minerals and so on, is much more apposite to an absolute grant (except for the reservation of a *poruppu*) than to the creation of the lease in the ordinary sense. As between the Zamindar and his son or brothers, it is not ordinarily to be assumed that the relationship of landlord and tenant was intended to be constituted.

The reference to '*poruppu*' in these transactions remains to be dealt with. It may not always be accurate to translate it as 'rent' in the sense in which that term is known to the law of landlord and tenant. It is one of the anomalies of Indian law that in the attempt to translate vernacular terms into corresponding English equivalents, the connotations of the words in the English law are unconsciously imported. For instance, the inappropriateness of defining the relationship between a Zamindar and his ryot in terms of the law of landlord and tenant has often been pointed out and yet the payment made by the ryot to the Zamindar still continues to be spoken of as 'rent'. In *Maharajah of Vizianagaram* v. *The Collector of Vizagapatam*[1], Sir John Wallis, referring to inams held subject to payment of *jodi, kattubadi* or *poruppu*, speaks of the payment as a 'small rent' and describes the tenures as being of the character of a permanent lease. It may be right enough to hold that such tenure-holders are not owners of proprietors within the meaning of Madras Act I of 1876; but with all respect, it will not be correct to assimilate the position of the grantor and the grantee in such cases to that of 'landlord' and 'tenant'. In the Indian law 'under tenure' is not the same as 'tenancy'.

The learned Advocate-General relied on the decision of the Judicial Committee in *Maharajah of Jeypore* v. *Rukmini Pattamahadevi Garu*[2], as an instance where their Lordships

1. (1914) 27 M.L.J. 278: I.L.R. 38 Mad. 1128 at 1130.
2. (1918) 36 M.L.J. 543: L.R. 46 I.A. 109: I.L.R. 42 Mad. 589 (P.C.).

F.B.
Arumugham Chetti v. Subramaniam Chetti.
Varadachariar, J.

have applied the principle of law of 'forfeiture' to similar tenures thereby indicating that they regarded the relationship as one of landlord and tenant. It may be observed that in that case the rent reserved was in their Lordships' opinion the principal matter (*see* p. 601) and after all they say (at p. 600) that they went at length into this aspect of the law of forfeiture, though it had not been raised in India, only because it was argued with much insistence at the Bar. As they found against the alleged denial of title, it ought not to be assumed that they would have applied the law of landlord and tenant to the case. The other portion of their Lordships' judgment where reference is made to *Forbes* v. *Meer Mahomed Tuquee*[1], relates to what are known as grants burdened with a service. Even in such cases, the grantor is allowed a right of *resumption* in cases of contumacious refusal of service, but such 'resumption' is not identical with the 'forfeiture' known to the law of landlord and tenant.

'*Poruppu*' is defined in Wilson's Glossary as a low or quit-rent levied from lands originally granted in inam or rent-free. Its connotation is thus not identical with that of 'rent' in the law of landlord and tenant. (*See also* Nelson's Madura Manual, Part IV, pp. 39, 121, 139, 140 and 191). The cases in *Vizianagaram Maharajah* v. *Suryanarayana*[2] and *Vizianagaram Maharajah* v. *Sitaramaraju*[3], show that it was not uncommon for Zamindars in this Presidency to insist on a payment of Kattubadi by grantees of inams from a prior Zamindar. The tenure in such cases will be an inam and not a tenancy. Whether as a matter of sentiment or as a result of the supposed prohibition against alienation in the Permanent Settlement Regulation, grants whether by way of reward for past services or by way of maintenance were sometimes made in the southern zamindaris not by an absolute alienation but by the creation of an under-tenure. In such cases provision was sometimes made for the payment of a *poruppu* to cover the peishcush on the village granted. (See *Venkateswara Ettiappa Naicker* v. *Alagoo Mootoo Servagaran*[4].) *See also* Ex. W-1 in the present case where the *poruppu* was fixed at the *Nijudhi* or assessment for the alienated village; see also *Fischer* v. *Secretary of State for*

1. (1870) 13 M.I.A. 438.
2. (1886) L.R. 13 I.A. 32: I.L.R. 9 Mad. 307 (P.C.).
3. (1895) I.L.R. 19 Mad. 100.
4. (1861) 8 M.I.A. 327 at 330, 331.

F.B.
Arumugham Chetti v. Subramaniam Chetti.
Varadachariar, J.

India in Council,[1] where the terms of Ex. D in that case are set out and the way that document was construed by the Privy Council in *Robert Fischer* v. *Secretary of State for India in Council*[2]. Relying on the statement in paragraph 6 under the title 'Family arrangements', in Halsbury's Laws of England, Vol. 15, the learned Advocate-General contended that by calling a transaction a 'family arrangement' the requirements of the law as to necessary formalities cannot be dispensed with. But unlike the Statute of Frauds, the Transfer of Property Act adopts it as a *general* principle in S. 9 that a transfer may be made without writing in every case in which a writing is not expressly required by law. Hence, the question in this country has always been whether the transaction under consideration falls within one or other of the particular categories specified in the various chapters of that Act. I concur with my learned brother in referring this question of law, in the terms stated in his judgment, for the opinion of a Full Bench.

The Advocate-General (*Sir A. Krishnaswamy Aiyar*) and *V. Ramaswami Aiyar* for the 2nd and 3rd appellants.

T. M. Krishnaswami Aiyar and *V. Subramania Aiyar* for the 2nd respondent.

The Court expressed the following

OPINION. *Varadachariar, J.*—My answer to the question referred is that the transaction does not constitute a lease within the meaning of S. 105 of the Transfer of Property Act and is therefore effective though oral. The reasons in support of this conclusion have been set forth in the concluding portion of the judgment delivered by me when referring the question to a Full Bench and I have very little to add. The learned Advocate-General laid some stress on the fact that the decision in *Zamindar of Polavaram* v. *Maharajah of Pittapuram*[3], referred to by me in that judgment has since been reversed by the Judicial Committee in *Zamindar of Polavaram* v. *Maharajah of Pittapuram*[4]. This does not affect the basis of my judgment, because, as I understand their Lordships' decision they do not express disapproval of the principle of law applied by the High Court in *Zamindar of Polavaram* v. *Maharajah of*

1. (1896) I.L.R. 19 Mad. 292 at 297.
2. (1898) L.R. 26 I.A. 16: I.L.R. 22 Mad. 270 at 283-5 (P.C.).
3. (1930) 60 M.L.J. 56: I.L.R. 54 Mad. 163.
4. (1936) 71 M.L.J. 347: L.R. 63 I.A. 304: I.L.R. 59 Mad. 910 (P.C.).

F.B.

Arumugham Chetti *v.* Subramaniam Chetti.

Varadachariar, J.

Pittapuram[1] as derivable from the judgment of the Full Bench in *Madam Pillai* v. *Badrakali Ammal*[2]. The Júdicial Commitee hold that on the facts of the case before them it was not reasonable to hold that there was any *other consideration* in addition to the price fixed for the sale. The High Court held that the promise by the vendee not to question the validity of the execution sale under which the vendor had purchased other properties as well constituted an additional item of consideration. But the Judicial Committee point out that as the period of 30 days allowed by law for questioning the execution sale had already expired "this promise was valueless". Their further observation that at best the promise only resembled other *covenants* which any sale may contain has no bearing upon the present case. It is sufficient to say that in winding up the discussion of this question, their Lordships emphasise the fact that both parties intended the transaction in question to be a sale and "in substance it was nothing but a sale." Applying this test, I am unable to hold that the transaction now before us was intended by the parties to be a lease or was in substance a lease.

Pandrang Row, J.

Pandrang Row, J.—I agree.

Burn, J.

Burn, J.—I find considerable difficulty in answering the question in the form in which it has been propounded. It does not seem to me to be possible to state the answer to the question in general terms. It seems to me quite conceivable that the transfer of the right to enjoy immovable property in perpetuity made by the holder of an impartible zamindari to a junior member on terms, or in pursuance of an arrangement, that the junior member will give up all claims for present or future maintenance and will pay annually to the Zamindar a sum of money might amount to a lease within the meaning of the Transfer of Property Act, so as to be without effect unless in writing registered. I see much force in the contention of the learned Advocate-General that if a transaction is in fact a lease as defined in S. 105 of the Transfer of Property Act, the requirements of the law regarding registration cannot be evaded merely by calling it a family arrangement. I think the answer would have to vary in accordance with the circumstances of each case. It seems to me not impossible to imagine

1. (1930) 60 M.L.J. 56: I.L.R. 54 Mad. 163.
2. (1922) 42 M.L.J. 410: I.L.R. 45 Mad. 612 (F.B.).

F.B.

Arumugham Chetti *v.* Subramaniam Chetti.

Burn, J.

a case of a junior member of a family of the holder of an impartible zamindari who might be himself interested in agriculture. If the holder of the zamindari transferred to him a portion of the zamindari in consideration of a premium with or without an annual rent reserved, one condition being that the junior member should withdraw his claim for maintenance, such a transaction might very well be a lease. The question however was argued before us with reference to the facts of the particular case and considering it from that point of view, I have no difficulty in holding that the transaction in question was not a lease within the meaning of S. 105 of the Transfer of Property Act. I do not think the learned Advocate-General was right in contending that the provision of maintenance was merely the motive for the transaction. It appears to me that the transaction itself was in its essence a provision for maintenance for the junior member. It is found as a fact that the amount of the *poruppu* or quit rent was due to the mere accident that the annual value of the village granted happened to be Rs. 800 more than the amount thought suitable for the maintenance of the junior member. In other words the payment of the *poruppu* was not the consideration for the grant to the junior member of the right to enjoy the village. On the facts found it seems to me quite clear that the Zamindar was concerned solely with the provision of maintenance and was not making a lease. If the annual income from the village had been estimated at precisely Rs. 1,200 there would have been no question of *poruppu* and it would have been impossible to suggest that the transaction was a lease. The transaction appears to me to be in its essence of the nature of a grant of the inam land. The facts deducible from the documents which were executed in the case of the other members of the family indicate that the Zamindar considered himself to be making an out-and-out grant rather than a lease.

S. V. V. ——— *Reference answered.*
Appeal dismissed.

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Fort William in Bengal.]

PRESENT:—LORD THANKERTON, SIR SHADI LAL AND SIR GEORGE RANKIN.

Hubert Rowan Hodge .. *Appellant**

v.

Shahebzada Mahomed Kamgar Shah and others .. *Respondents.*

P.C.

Hubert Rowan Hodge *v.* Shahebzada Mahomed Kamgar Shah.

Limitation Act (IX of 1908), S. 12 (2), Sch. I, Art. 151—Procedure—Appeal from order of High Court—Out of time—Unavoidable delay—" Time requisite for obtaining copy of order "—Exclusion.

On the 5th December, 1934, an order was made by a High Court Judge directing the Registrar of the Court to accept an offer for a certain property made by an intending purchaser. That property formed part of the estate of a deceased man. The heir and legal representative of the deceased wished to appeal against the Judge's order on the ground that it contained no order in his favour as to costs, and that he had no opportunity to argue the matter of costs before the Court. Negotiations and correspondence with regard to the matter continued until 31st January, 1935, when the Judge gave his decision on the question of costs. During February, the intending appellant was engaged in correspondence with the Registrar with a view to applying to the Judge to date the order as of the 31st January, 1935, instead of the 5th December, 1934. On 25th February, the Judge decided that the order should be dated the 5th December, 1934. During March, 1935, necessary formalities in connection with the order were carried through, and, on 28th March, the order was completed and filed. On 8th April, 1935, the appeal was filed, the purchaser not being made a party. On 18th April, leave was obtained to amend the appeal by adding the purchaser as a party. A plea of limitation having been raised,

Held, that with the exception of the delay of ten days between the presentation of the appeal and its amendment, it was a case of unavoidable delay owing to *bona fide* attempts made by the party to obtain a copy of the order or to have it amended, and that it was a fit case to treat the appeal as competent notwithstanding that it was filed out of time.

Appeal from a judgment of the High Court of Judicature at Fort William (Derbyshire, C.J. and Costello, J.) dated 31st July, 1935, reversing an order made by Cunliffe, J., on 5th December, 1934, and holding, on a preliminary objection taken to the appeal, that the appeal to the High Court was in time.

The appellant, one H. R. Hodge, was the highest bidder at a sale by auction held by the Registrar of the High Court of a property known as Dhalbloom Mining Estate, which belonged to the estate of Prince Mohamed Bukhtyar Shah deceased. On 1st June,

---

* P. C. Appeal No. 55 of 1936. 29th January, 1937.

P.C.

Hubert Rowan Hodge *v.* Shahebzada Mahomed Kamgar Shah.

1905, an official receiver was appointed for the property, and he remained in possession of it until the present time. On 3rd March, 1931, Panckridge, J., ordered that the Dhalbloom Mining Estate, or a sufficient part of it, should be sold by the Registrar of the Court to the best purchaser who could be obtained, provided that the Registrar should consider that a sufficient sum had been offered. It was further ordered that the money realised by any sale should be paid into Court and applied towards payment in manner prescribed. Pursuant to that order, the property was from time to time put up to auction by the Registrar. On19th February, 1932, the highest bid received was Rs. 80,000 and the sale was adjourned to 17th June, when the highest bid was Rs. 95,000. On four subsequent occasions the property was again put up for sale, but no bid was received. On 14th August, 1934, the property was put up for sale, and a bid of Rs. 1,50,000 was made by Hodge, who was the highest bidder. The Registrar then made a note in his minute book to the effect that the reserve price had not been reached but that, as the new bid was so much higher than previous bids, he had decided to accept it subject to confirmation by a judge.

Hodge thereupon paid a deposit of 25 per cent. of the purchase price, and the matter was referred to Cunliffe, J., who, on 28th August, 1934, adjourned the matter for three months in order that it should be ascertained whether there were intending purchasers willing to make higher offers than Rs. 1,50,000. When the matter again came before him on December 3, 1934, it was found that there was a would-be purchaser who was prepared to offer Rs. 1,80,000. Hodge then in Court agreed to offer the same amount, and an order was drawn up directing the Registrar to accept his offer.

The contesting respondent in the present appeal, one, Shahebzada Mahomed Kamgar Shah, one of the heirs and legal representatives of the deceased Prince (the other respondents being attaching creditors of members of the deceased's family), contended that the sale as ordered by Cunliffe, J., was illegal because contrary to the rules laid down by the High Court for the sale of properties in such circumstances (namely, Rr. 1, 2, 20 and 21 in Chapter XXVII of the Rules of the Original Side of the High Court).

On the appeal of the present contesting respondent to the High Court, a preliminary objection to the hearing of the appeal was taken on behalf of the present appellant, Hodge, on the ground that the appeal was outside the time prescribed by Art. 151 of Sch. I to the Limitation Act, 1908, Cunliffe, J.'s order having been made on December 5, 1934, and the appeal having been filed on April 8,

P.C.

Hubert Rowan Hodge v. Shahebzada Mahomed Kamgar Shah.

1935, some 124 days later. It was submitted on the present appellant's behalf that, by reason of Art. 151 of the Limitation Act, the appeal should have been filed within 20 days of the order. The present respondent contended that he was entitled to an extension of time by virtue of S. 12 (2) of the Act.

The facts relating to this matter were as follows: On December 3, 1934, both Hodge and the respondent were represented at the hearing before Cunliffe, J., but neither was given an opportunity to argue the question of costs. The order was subsequently made and signed by the Judge not in the presence of the parties, and he added to it the words " no order as to costs ". On December 7, the terms of the order came to the knowledge of the parties, and the present respondent wished to appeal.

He considered himself however, entitled to some order as to costs in his favour, in respect of the proceedings before Cunliffe, J., and his attorney at once informed those of the purchaser that he intended to make submissions to the Court with regard to the costs. Negotiations and correspondence on the matter continued until January 31, 1935, when Cunliffe, J., gave judgment as to costs, the minute reciting that there would be no order as to costs " in favour of any party except in the case of the Official Receiver who will be given his costs out of the estate ". On February 6, 1935, the parties had an appointment before the Registrar which was adjourned in order that the respondent's attorney might mention the order of December 5, 1934, with a view to having its date altered. The matter was mentioned to Cunliffe, J., on February 25, the respondent's attorney having intimated by letters to the Registrar in identical terms, dated February 7 and 13, that he wished the date of the order altered in order that he might be in time to appeal against it. Cunliffe, J., directed the order to be dated December 5, 1934. On March 2, 1935, the order was settled and passed in the presence of both parties and was given for engrossment on the same day. On March 12, the order was signed by the Registrar, and on the 17th it was served on the various parties. On the 25th, the Court notified the amount which would be required for stamps, and on the 28th the order was completed and filed. On April 8, the appeal was filed and accepted by the office, the present appellant, the purchaser, not being made a party to it. On April 18, leave was given by the High Court to add the purchaser as a party.

The High Court held, as to the preliminary objection, that, with the exception of the two periods from February 6 to 13, when the appellant could, they said, have mentioned the matter to the Court and did not, and the period from April 8 to 18, the

P.C.

Hubert Rowan Hodge *v.* Shahebzada Mahomed Kamgar Shah.

time between presentation of the appeal and the amendment bringing in the purchaser as a party, there was no unavoidable delay on the part of the present respondent with regard to his appeal.

With regard to Cunliffe, J.'s order accepting the purchaser's offer for the property, the Court held that, while the Judge undoubtedly acted with the best possible motive in accepting the offer, he would, if he had had certain additional particulars laid before him, have concluded that the present appellant's offer was too low and ought not to be accepted.

The purchaser preferred an appeal to the Privy Council.

A. M. Dunne, K.C. and *L. P. E. Pugh* for Appellant.

S. H. R. Abdul Majid for Respondents.

29th January, 1937. Their Lordships' judgment was delivered by

Lord Thankerton.

LORD THANKERTON.—Counsel for the appellant in this case submits two questions for consideration by their Lordships.

The first question is with regard as to the competency of the appeal taken to the High Court from the order of Cunliffe, J. *Prima facie* there is good reason why that question should be raised, because, the period of limitation provided by Art. 151 of the Limitation Act for appealing against the order being 20 days, 124 days in fact elapsed before the appeal was taken.

The contesting respondent's reply in excuse of his action was to say that, as provided by S. 12 (2) of the Limitation Act, a portion of the 124 days, the deduction of which would leave less than 20 days, was accounted for by the period which elapsed before he could obtain a copy of the order against which he was going to appeal. The Judges of the High Court have held that the respondent has succeeded upon that, and they have so held on a detailed examination of what occurred during that period. Their Lordships agree with the conclusion at which the High Court arrived. It might indeed be arguable that the first period of seven days, from the 6th to the 13th February, which is disallowed as against the respondent, should not have been so disallowed as, in the first letter, he asks the registrar to do something, and the second letter is a reminder that he had asked him, although in form it makes no reference to the previous letter.

P.C.

Hubert Rowan Hodge *v.* Shahebzada Mahomed Kamgar Shah.

Lord Thankerton.

Except as to the charging of that period against the respondent, their Lordships are constrained to agree with the High Court. The first portion of the material period was occupied in an attempt to obtain a variation of the order as to costs. In fact a variation was made although not the one asked for, and in their Lordships' opinion it cannot be said that the respondent was failing during that period to take reasonable and proper steps to obtain a copy of the order. The second portion of the period seems mainly to have been accounted for by an attempt on the part of the respondent by application to the registrar to have the order when issued dated not as of December 5, 1934, but as at January 31, 1935, which was not the true date for at any rate the main part of the judgment had been delivered on December 5. In that attempt he was unsuccessful. The application may indeed have been doomed to failure from the first; but the fact remains that, during that period, the respondent was occupied in making application to the registrar for something which was connected with the settling of the order, and the order was in fact not ultimately completed and filed until the March 28, 1935. Accordingly their Lordships agree with the High Court that the appeal was competent.

There remains a question on the merits of the appeal. Unfortunately, their Lordships are in difficulty here as to dealing with the decision of the High Court on the merits. A sentence from the opinion of the learned Chief Justice will make clear the point to which they are referring. The learned Chief Justice says:—

"But the Judge did not, we are told, examine the valuer's report of the property and did not see what the reserve price was and the reasons for fixing the reserve price. We sent for the registrar who produced to us the valuation which contains the suggested reserve price and we have perused it, particularly that part of it which deals with the reserve valuation itself and the reasons for arriving at that figure. I think if the learned Judge had done that in this case he would have come to the conclusion that bids that were offered in Court were too low and ought not to have been accepted. I am of opinion that the learned Judge although he acted with the best possible motive was wrong in this case in purporting to confirm the bid of Mr. Hodge".

Their Lordships have not been provided with the material upon which the High Court came to that decision, and they are in those circumstances unable to form any conclusion as to whether the decision of the High Court on the merits was wrong or right.

P.C.

Hubert Rowan Hodge v. Shahebzada Mahomed Kamgar Shah.

Lord Thankerton.

Their Lordships are accordingly of opinion that the appeal should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitors for Appellant: *Sanderson, Lee & Co.*

Solicitors for Respondents: *Francis & Harker.*

R. C. C. —— *Appeal dismissed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Ordinary Original Civil Jurisdiction.]

PRESENT:—SIR HORACE OWEN COMPTON BEASLEY, *Kt., Chief Justice,* MR. JUSTICE MOCKETT AND MR. JUSTICE LAKSHMANA RAO.

F.B.

Commissioner of Income-tax, Madras v. Rajah of Bobbili.

The Commissioner of Income-tax, Madras .. *Petitioner**

v.

The Honourable Sri Ravu Swetachalapathi Ramakrishna Ranga Rao Bahadur, Rajah of Bobbili .. *Respondent.*

Income-tax—Impartible estate—Income from property—Joint Hindu family—Assessment of holder of estate as an individual—Propriety—Nature and incidents of impartible estate—Income-tax Act (XI of 1922), S. 3.

The assessee who was the holder of an impartible estate was also the Chief Minister to the Government of Madras and the managing member of a Hindu undivided family. He was assessed both to income-tax and to super-tax, super-tax being levied on him as an individual. With reference to the income from the impartible estate, from money-lending business and from other sources, namely, dividends and quarries and fisheries he was assessed as an individual. The assessee contended that those sums were income derived from the impartible estate and that the joint family and not he as an individual should have been assessed in respect thereof.

Held, that for purposes of income-tax, the income from the impartible estate should be treated as the income of the individual assessee and not as the income of the joint family of which he was the manager, and that the assessment to income-tax should be made on that basis.

Parbati Kumari Debi v. *Jagadis Chunder Dhabal,* (1902) L.R. 29 I.A. 82: I.L.R. 29 Cal. 433 (P.C.); *Shiba Prasad Singh* v. *Prayag Kumari Debi,* (1932) 63 M.L.J 196: L.R. 59 I.A. 331: I.L.R. 59 Cal. 1399 (P.C.) and *Jagadamba Kumari* v. *Wazir Narain Singh,* (1922) 44 M.L.J. 503: L.R. 50 I.A. 1: I.L.R. 2 Pat. 319 (P.C.), considered.

Sri Sri Rajah Shiva Prasad Singh v. *The Crown,* (1924) I.L.R. 4 Pat. 73, referred to.

Krishan Kishore v. *The Commissioner of Income-tax,* (1932) I.L.R. 14 Lah. 255, disapproved.

Reference under S. 66 (2) of the Indian Income-tax Act XI of 1922 by the Commissioner of Income-tax, Madras.

Case stated by the Commissioner of Income-tax, Madras, was as follows:—

*O. P. No. 224 of 1936. 4th December, 1936.

F.B.

Commissioner of Income-tax, Madras *v.* Rajah of Bobbili.

I have the honour to refer the following case for the decision of the Honourable the Judges of the High Court under S. 66 (2) of the Income-tax Act XI of 1922.

The Petitioner is the Rajah of Bobbili, the present holder of the Impartible Estate of Bobbili. During the 'previous year' (1st April, 1934 to 31st March, 1935) he was also the Chief Minister to the Government of Madras. He is, besides, the managing member of a Hindu undivided family, of which he and his brother are the senior coparceners.

For the assessment year 1935-36 his total income from all sources liable to income-tax was ascertained to be Rs. 64,083 made up of the following items:—

		Rs.
1.	Salaries ..	49,399
2.	Interest on Securities ..	420
3.	Property ..	8,446
4.	Business: Money-lending (Rs. 998) and Kerosene oil agency (Rs. 525) ..	1,523
5.	Other sources: Dividends (Rs. 540) and quarries and fisheries (Rs. 3,755) ..	4,295
	Rs.	64,083

He was assessed on the above income both to income-tax and super-tax. Super-tax was levied as on an individual, the amount treated as exempt being Rs. 30,000.

Of the figures given above, items (1) and (2), Rs. 10 out of item (3), Rs. 525 out of item (4) (representing income from Kerosene and Petrol agency) and Rs. 540 out of item (5) (representing dividends) are found and admitted to be income accruing to the petitioner as an individual and not to the joint family of which he is a member. The remaining sums, *viz.*, Rs. 8,436 from property, Rs. 998 from money-lending business and Rs. 3,755 from other sources (fisheries and quarries) are income derived from the impartible estate. The petitioner contends, on this ground, that they are income of the joint family. He claims that the above items of income should not have been included in this assessment which is one made on the Rajah as an individual.

As the authorities below have disallowed the contention the petitioner requires me to refer to the High Court two questions of law marked (*a*) and (*b*) in the application for reference. As the questions in the form framed by him are not suitable for reference, I have reframed them with the consent of the petitioner's Advocate into a single question as shown below and refer it accordingly for the decision of the High Court.

F.B.

Commissioner of Income-tax, Madras *v.* Rajah of Bobbili.

Question.—"Whether in respect of the following three sums, *viz.*, Rs. 8,436 being income assessable under the head 'property' Rs. 998 under 'business' and Rs. 3,755 under other sources (quarries and fisheries) the petitioner was rightly taxed as an individual or whether he should have been taxed as the representative of a Hindu undivided family".

The point to be decided is whether the income derived by the Rajah from the impartible estate is income of the joint family of which the Rajah is the manager. The petitioner's contention is based on the doctrine that the impartible estate, the holder of which belongs to a joint family, is the property of the family. In my opinion that is stated too broadly. It would be more accurate to say that for certain limited purposes the law requires the estate to be dealt with as if it were the property of the family, while in all other respects it is treated as the absolute property of the holder for the time being. This is brought out in S. 587 at p. 600 of Mulla's Hindu Law (7th Edn.) which I quote below:—

"587. *Impartible property whether coparcenary property.*—In considering whether an ancestral impartible estate is coparcenary property or not, a distinction should be drawn between present rights, that is, the right to demand a partition and the right to joint enjoyment, and future rights. In the case of an impartible estate, the right to partition and the right of joint enjoyment are from the very nature of the property incapable of existence, and there is no coparcenary to this extent. No coparcener, therefore, can prevent alienations of the estate by the holder for the time being either by gift or by will (S. 588) nor is he entitled to maintenance out of the estate (S. 589). But as regards future rights, that is, the right to survivorship, the property is to be treated as coparcenary property, so that on the death intestate of the last holder, it will devolve by survivorship according to the rules stated in S. 591 below".

The holder of an impartible estate is entitled to exclusive possession and enjoyment of the estate. His power of management of the revenue of the estate is much wider than that exercised by the manager of an ordinary Hindu undivided family over the income of the family. He is competent to alienate the estate except when his right to do so is denied by statute, as in the Madras Presidency. Acquisitions out of the savings of an impartible estate do not form part of the estate but must be regarded as "self-acquisitions" of the holder. (*Shiba Prasad Singh* v. *Prayag Kumari Debi*[1] and *Jagadamba Kumari* v. *Wazir Narain Singh*[2].) It follows that the estate is the holder's individual property so long as he continues to hold it, and that the income which he derives from it is his own and not that of a Hindu undivided family. This is the opinion of the Privy Council, as appears from the following passage of the judgment quoted above. *Jagadamba Kumari* v. *Wazir Narain Singh*[2]:

"The income when received is the absolute property of the owner of the

1. (1932) 63 M.L.J. 196: L.R. 59 I.A. 331: I.L.R. 59 Cal. 1399 (P.C.).
2. (1922) 44 M.L.J. 503: L.R. 50 I.A. 1: I.L.R. 2 Pat. 319 (P.C.).

F.B.

Commissioner of Income-tax, Madras *v.* Rajah of Bobbili.

impartible estate. It differs in no way from property that he might have gained by his own effort, or that had come to him in circumstances entirely dissociated from the ownership of the Raj".

I draw the above conclusions from pronouncements of the Privy Council in cases relating not to income-tax assessment but to succession, but I submit that they fully bear out the findings of the Patna High Court, directly relevant to the present case, which was given in Miscellaneous Case No. 73 of 1923 (In re *Raja Jyoti Prasad Singh Deo of Pandikote*) reproduced at p. 388 of Vol. I of Srinivasan's reports of Income-tax cases.

For these reasons, in my opinion, the income derived from the impartible estate should be assessed as that of an individual. The question should be answered accordingly.

M. Patanjali Sastri and *C. S. Rama Rao Sahib* for Petitioner.

V. Govindarajachari, R. Sankaran and *V. V. Raghavan* for Respondent.

The Court delivered the following

JUDGMENT.—The question before us is:

"Whether in respect of the following three sums, *viz.*, Rs. 8,436 being income assessable under the head 'property', Rs. 998 under 'business' and Rs. 3,755 under other sources (quarries and fisheries) the petitioner was rightly taxed as an individual or whether he should have been taxed as the representative of a Hindu undivided family".

The assessee, the Raja of Bobbili, is the present holder of the impartible estate of Bobbili. During the previous year (1st April, 1934 to 31st March, 1935) he was also the Chief Minister to the Government of Madras. He is, besides, the managing member of a Hindu undivided family of which he and his brother are the senior coparceners. For the assessment year 1935-36 his total income from all sources liable to income-tax was ascertained to be Rs. 64,083 made up of the following items:—

		Rs.
1.	Salaries ..	49,399
2.	Interest on Securities ..	420
3.	Property ..	8,446
4.	Business: Money-lending (Rs. 998) and Kerosene oil agency (Rs. 525) ..	1,523
5.	Other sources: Dividends (Rs. 540) and quarries and fisheries (Rs. 3,755) ..	4,295
		64,083

F.B.

Commissioner of Income-tax, Madras *v.* Rajah of Bobbili.

He was assessed both to income-tax and super-tax, super-tax being levied as on an individual. With the exception of certain amounts it was admitted that the Raja was rightly assessed as an individual. The sums about which there is a dispute are Rs. 8,436 from property, Rs. 998 from money-lending business and Rs. 3,755 from other sources (fisheries and quarries). These sums are income derived from the impartible estate. The assessee's contention is that they are income of the joint family and therefore the joint family should have been assessed as such in respect of them and not the Raja as an individual.

The point for consideration is whether for purposes of income-tax the income from the impartible estate is income of the joint family of which the Raja is the manager; and in this connection certain principles with regard to impartible estates must be stated: and they are that from the very nature of the estate there can be no right of partition and that except in Madras no coparcener can restrain alienations by the head of the family though the right to maintenance and of survivorship may exist. The distinction between an impartible estate and a joint family estate has now been made clear in a number of decisions. What has now to be considered is the income from such an estate, the Income-tax Commissioner's claim being that this income must be regarded for the purposes of income-tax as the income of an individual and in support of his claim a number of cases have been cited. Amongst those cases which in our opinion lend considerable support to the Income-tax Commissioner's contention is *Shiba Prasad Singh* v. *Prayag Kumari Debi*[1] a decision of the Privy Council. The litigation in that case related to the succession to the estate of one Râja Durga Prasad who died childless survived by three widows who were the plaintiffs in the suit and the respondents in the first appeal. The defendant Shiba Prasad Singh was a collateral relative of the deceased Raja. The parties were governed by the Mitakshara Law. The chief item of property was the impartible estate but the Raja died possessed of considerable other immovable property, also of cash, deposits in banks, jewellery and other movable property. Upon the Raja's death the defendant took possession of the impartible estate and also other property of the Raja claiming that it passed to him by survivorship. The plaintiffs alleged that the

1. (1932) 63 M.L.J. 196: L.R. 59 I.A. 331: I.L.R. 59 Cal. 1399 (P.C.).

F.B.

Commissioner of Income-tax, Madras. *v.* Rajah of Bobbili.

family had ceased to be joint, and claimed the estate under the Hindu Law, claiming the other immovable and movable property as self-acquisitions. Amongst the questions of law dealt with was whether the holder of an impartible estate can incorporate with it property either movable or immovable so as to make that property descend according to the law of primogeniture governing the estate. It was held that the blending of income from self-acquired property with income from an impartible estate raises no presumption of an intention to incorporate but that intention can be indicated in other modes and that movable property cannot form an accretion to an ancestral impartible estate and even the income of an estate of that nature is not an accretion to it. In the course of the judgment of their Lordships' Board a large number of cases touching the question are referred to and examined; and in drawing a distinction between an impartible estate and the ordinary joint family estate on page 1413 it is stated:

"Impartibility is essentially a creature of custom. In the case of ordinary joint family property, the members of the family have (1) the right of partition, (2) the right to restrain alienations by the head of the family except for necessity, (3) the right of maintenance, and (4) the right of survivorship. The first of these rights cannot exist in the case of an impartible estate, though ancestral, from the very nature of the estate. The second is incompatible with the custom of impartibility as laid down in *Sartaj Kuari's case*[1] and the *first Pittapur case*[2] and so also the third as held in the *second Pittapur case*[3]. To this extent the general law of the Mitakshara has been superseded by custom, and the impartible estate, though ancestral, is clothed with the incidents of self-acquired and separate property. But the right of survivorship is not inconsistent with the custom of impartibility. This right therefore still remains, and this is what was held in *Baijnath's case*[4]. To this extent the estate still retains its character of joint family property, and its devolution is governed by the general Mitakshara law applicable to such property".

The important words affecting the question here are those which state that "the impartible estate, though ancestral, is clothed with the incidents of self-acquired and separate property". After dealing with the question of whether the family had ceased to be joint their Lordships consider on page 1414, the second question, namely, whether it is competent to the holder of an ancestral impartible estate to incorporate with the estate other properties belonging to him and a number

1. (1888) L.R. 15 I.A. 51: I.L.R. 10 All. 272 (P.C.).
2. (1899) 9 M.L.J. (Supp.) 1: L.R. 26 I.A. 83: I.L.R. 22 Mad. 383 (P.C.).
3. (1918) 35 M.L.J. 392: L.R. 45 I.A. 148: I.L.R. 41 Mad. 778 (P.C.).
4. (1921) 40 M.L.J. 387: L.R. 48 I.A. 195: I.L.R. 43 All. 228 (P.C.).

F.B.

Commissioner of Income-tax, Madras *v.* Rajah of Bobbili.

of decisions are referred to, the first of them being *Parbati Kumari Debi* v. *Jagadis Chunder Dhabal*[1] which was a case relating to succession to an ancestral impartible estate where some property had been purchased on behalf of the last holder out of the savings of the estate. It was contended that this property had been incorporated with the estate and therefore passed with it. The evidence was that the rents of the estate were collected by the same servant and the collection papers were kept with the papers of the estate and it was held that these facts were not adequate for holding that the Raja intended to incorporate the property with the ancestral estate for the purposes of his succession and that the property must therefore follow the rule of Mithakshara to self-acquired property. Next *Janaki Prasad Singh* v. *Dwaraka Prasad Singh*[2] is cited. That also relates to immovable property and referring to the previously cited case, it was held that the question whether properties acquired by an owner become part of the ancestral estate for the purposes of his succession depends on his intention to incorporate the acquisitions with the original estate. Another case referred to is *Jagadamba Kumari* v. *Wazir Narain Singh*[3] which was a case relied upon by Mr. Patanjali Sastri in support of his argument, and to which a further reference will be made in this judgment. The actual point of the decision in that case was that where the estate is impartible no such presumption as to an intention to incorporate can be drawn from the blending of the income of self-acquired property with the income of the estate as in the case of ordinary joint family estate. The case does not decide that, if the estate is impartible, there can be no incorporation at all. On the contrary, there is an implication, and that too a strong one, that there can be an incorporation at least as regards immovable property. Several other cases are also referred to. On page 1418 the distinction between the blending of income in the case of a member of a joint family and a member of it who is the holder of an ancestral impartible estate is stated as follows:

" If a member of a joint family blends the income of his self-acquired property with the income of the joint family property, it raises a presumption of an intention to incorporate the self-acquired property with the joint

1. (1902) L.R. 29 I.A. 82: I.L.R. 29 Cal. 433 (P.C.).
2. (1913) 25 M.L.J. 34: L.R. 40 I.A. 170: I.L.R. 35 All. 391 (P.C.).
3. (1922) 44 M.L.J. 503: L.R. 50 I.A. 1: I.L.R. 2 Pat. 319 (P.C.).

F.B.

Commissioner of Income-tax, Madras v. Rajah of Bobbili.

family property. *Rajani Kanta Pal* v. *Jagmohan Pal*[1]. But no such presumption can arise if a member of a joint family, who is the holder of an ancestral impartible estate, mixes the income of his self-acquired property with the income of the estate".

Having dealt with the question of the incorporation of immovable property purchased out of the income of an impartible estate and having held that it can form an accretion to the joint family estate provided the intention on the part of the holder of the impartible estate, is clearly proved, their Lordships proceed to deal on page 1422, with movable property as distinguished from immovable property and there says:

"None of these considerations, however, apply to movable property. Such property, their Lordships think, cannot form an accretion to an ancestral impartible estate".

And here follow the very important words:

"The income even of such an estate is not accretion to the estate. As was said by the Board in *Jagadamba Kumari* v. *Wazir Narain Singh*[2] 'the income when received is the absolute property of the owner of the impartible estate'. It does not attach to the estate as does the income of an ordinary ancestral estate attach to that estate. The conclusion to which their Lordships have come on this part of the case is that while immovable property can be incorporated with an impartible estate, movable property cannot".

It will be convenient now to examine the case reported in *Jagadamba Kumari* v. *Wazir Narain Singh*[2], namely, another decision of the Privy Council. There it was held that the income of an impartible estate is not so affected by its source that it should be assumed to form an accretion to the estate and further as the holder is entitled to the whole of the income, the principle applicable to an ordinary join family that self-acquired moneys are to be regarded as joint family property if mixed with the moneys of the joint family, does not necessarily apply to property acquired by the holder of an impartible estate out of the income. In that case, the deceased holder of an impartible estate had applied saving out of the income, to purchasing immovable properties and making loans, the rents and interest being received by the manager of the estate and treated in his books as part of the income of the estate and it was held that the property so acquired had not become part of the impartible estate but remained the separate property of the deceased holder. On

1. (1923) 44 M.L.J. 561: L.R. 50 I.A. 173: I.L.R. 50 Cal. 439 (P.C.).
2. (1922) 44 M.L.J. 503: L.R. 50 I.A. 1: I.L.R. 2 Pat. 319 (P.C.).

F.B.

Commissioner of Income-tax, Madras v. Rajah of Bobbili.

question raised, namely, whether movable property can ever be treated as an accretion to immovable property, about which their Lordships expressed considerable doubt has since been set at rest by the decision of their Lordships in *Shiba Prasad Singh* v. *Prayag Kumari Debi*[1] already referred to. Lord Buckmaster in delivering the judgment of their Lordships' Board on page 325 states as follows:

"Originally the estate was in debt, and as there is no evidence of any acquisition of property from other sources, it follows that all the estate possessed by the Raja, other than the impartible *raj*, was derived from the income of the *raj* itself. In the end this income produced very considerable property. There were certain villages, certain mortgages, usufructuary and otherwise, sums due on bonds and decrees, Government promissory notes to the extent of two lakhs, and other movable and immovable properties. With the exception of the Government promissory notes the whole of these have been awarded to the plaintiff upon the ground that they represented an accretion to the estate and descended with it."

Their Lordships think that this conclusion is wrong and that its error is due to the idea that the produce of the impartible estate naturally belongs to and forms an accretion to the original property. In fact when the true position is considered there is no accretion at all. The income when received is the absolute property of the owner of the impartible estate. It differs in no way from property that he might have gained by his own effort or that had come to him in circumstances entirely dissociated from the ownership of the *raj*. It is a strong assumption to make that the income of the property of this nature is so affected by the source from which it came that it still retains its original character.

It is possible that this confusion is due to the consideration of the position with regard to an ordinary joint family estate. In such a case, the income, equally with the corpus, forms part of the family property, and if the owner mixes his own moneys with the moneys of the family as per example by putting the whole into one account at the Bank, or by treating them in his accounts as indistinguishable, his own earnings share with the property with which they are mingled, the character of joint family property; but no such considerations necessarily apply, to the income from impartible property. These two cases and *Parbati Kumari Debi* v. *Jagadis Chunder Dhabal*[2] are the only three Privy Council decisions where this

1. (1932) 63 M.L.J. 196: L.R. 59 I.A. 331: I.L.R. 59 Cal. 1399 (P.C.).
2. (1902) L.R. 29 I.A. 82: I.L.R. 29 Cal. 433 (P.C.).

F.B.

Commissioner of Income-tax, Madras v. Rajah of Bobbili.

question of income from impartible estate has been considered. It appears clearly from these decisions that such income is in no respect different from the income derived from the personal exertions of the holder of the impartible estate or his other self-acquisitions and this income comes to him because he is the holder of the impartible estate. Why should this income be treated for the purposes of income-tax differently to his income arising from his salary as a Minister in respect of which he is assessed under S. 3 as an individual. In addition to these three Privy Council decisions, there is a decision of the Patna High Court which is directly in point, namely, *Sri Sri Rajah Shiva Prasad Singh* v. *The Crown*[1]. There it was held that the Finance Act of 1922, which for the purpose of assessing super-tax allows a larger deduction from income in the case of a Hindu joint family than in the case of an individual, contemplates that that larger deduction shall be made only in a case of the income of an undivided family in which all the coparceners are interested, and not in the case of an impartible estate where the income is the sole property of the holder for the time being. On page 88 Dawson Miller, C.J., says:—

"The income of the estate is that of the incumbent for the time being, nor does the fact that he is bound to maintain his sons entitle him to treat the income as that of the undivided family. It is essentially his income and I so hold. The Finance Act contemplates the larger deduction for purposes of super-tax only in a case where the income is that of the undivided family in which they are all jointly interested and not in the case of an impartible estate where the income is the sole property of the holder for the time being".

The latest decision of the Privy Council in *Collector of Gorakhpur* v. *Ram Sunder Mal*[2] does not touch this question and what was decided there was that the right of the junior members of the family to maintenance out of an ancestral impartible estate is based upon their joint ownership and not custom. It does not say that the income of an impartible estate is not the income of the holder for the time being or that the latter is bound in law to apply the income or any portion thereof towards maintenance of the junior members. The contention of the assessee that this income falls to be assessed as that of a Hindu undivided family is founded upon

1. (1924) I.L.R. 4 Pat. 73.
2. (1934) 67 M.L.J. 274: L.R. 61 I.A. 286: I.L.R. 56 All. 468 (P.C.).

F.B.

Commissioner of Income-tax, Madras *v.* Rajah of Bobbili.

the words of S. 14 of the Income-tax Act which reads as follows:

"The tax shall not be payable by an assessee in respect of any sum which he receives as a member of a Hindu undivided family".

The object of this exemption is to save double taxation and therefore where the Hindu undivided family has been assessed under S. 3 in respect of its income a member of it is not to be assessed again individually. It is argued that the assessee here who is admittedly a member of a Hindu undivided family, has received the income in question as such member, that he is therefore exempt from an individual assessment and that the words of the section themselves therefore negative the income-tax authorities' contention: and further assistance is sought by reference to decisions both of this High Court and other High Courts. Taking this High Court first, there is *Commissioner of Income-tax* v. *Zamindar of Chemudu*[1] where it was held that a sum received as maintenance by an assessee as the brother of the last holder of an ancestral impartible estate entitled under the law to receive maintenance out of such estate is a sum received by him as a member of a Hindu undivided family, within the meaning of cl. (1) of S. 14 of the Indian Income-tax Act and that the right to maintenance which the son of a zamindar still possesses is not the creature of custom but it is an incident to the ordinary joint family property which has been left untouched by custom despite its encroachment on the other incidents, that is, he receives the maintenance by reason of his status. As Ramesam, J., who delivered the judgment of the Full Bench on page 1027 says:—

"The question is whether the assessee received his payment as a member of a Hindu undivided family. Undoubtedly he does receive this payment of Rs. 6,000 because he is a member of the undivided Hindu family".

It is different in the case of the assessee here. It is true that he is a member of a Hindu undivided family but he receives nothing from the family. The income is received by him as the holder of the impartible estate and it cannot be said that he receives it as a member of a Hindu undivided family. The income is his and the junior members have no right therein. *Krishan Kishore* v. *The Commissioner of Income-tax*[2] was also cited for the assessee. What was decided in that case was that there is no legal sanction for the proposition that

---

1. (1934) 67 M.L.J. 306: I.L.R. 57 Mad. 1023 (F.B.).
2. (1932) I.L.R. 14 Lah. 255.

F.B.
Commissioner of Income-tax, Madras v. Rajah of Bobbili.

an estate which is governed by the rule of primogeniture cannot belong to an undivided Hindu family but must be the sole property of the person who has succeeded to it by the rule of primogeniture. This decision, however, does not touch the question in point here. It is not disputed that the corpus belongs to the undivided family. The question is as regards the income; and if in this case it is assumed that the income from an impartible estate means the joint family income, then that is clearly contrary to what was decided in *Jagadamba Kumari v. Wazir Narain Singh*[1], *Parbati Kumari Debi v. Jagadis Chunder Dhabal*[2] and *Shiba Prasad Singh v. Prayag Kumari Debi*[3], and to none of these cases is any reference made; and we must respectfully dissent from that view. In *Commissioner of Income-tax, Bihar and Orissa v. Maharajadiraj Kumar Visheswar Singh*[4] it was held that S. 14 (1) of the Income-tax Act applies only to sums received by a member of a Hindu undivided family out of income to a share in which he has a vested right, that is to say, sums which he receives from the joint income of the family and that a sum received by an assessee because he is a member of an undivided family does not stand on the same footing as a sum received by him as a member of the family within the meaning of S. 14 (1) of the Act. It is contended that this case assists the assessee because it shows that the income is still the joint income of the family. But the assertion of the assessee that the allowance was paid out of joint family property was not contraverted in that case and as stated in the leading judgment the Court had not to consider the nature of the income from the impartible estate in the hands of the holder. In our view the junior member receives maintenance because he is entitled to a share in the corpus and the holder of the impartible estate is bound to maintain the junior members of the family and no useful purpose will be served by a reference to other cases as none of the cases cited on behalf of the assessee, in our opinion, destroy the force of those relied upon by the Commissioner of Income-tax. We hold, therefore, that the assessee was rightly assessed in respect of his income as an individual. The question

1. (1922) 44 M.L.J. 503: L.R. 50 I.A. 1: I.L.R. 2 Pat. 319 (P.C.).
2. (1902) L.R. 29 I.A. 82: I.L.R. 29 Cal. 433 (P.C.).
3. (1932) 63 M.L.J. 196: L.R. 59 I.A. 331: I.L.R. 59 Cal. 1399 (P.C.).
4. (1935) I.L.R. 14 Pat. 785 (S.B.).

propounded is answered accordingly. The assessee will pay Rs. 250 costs to the Commissioner of Income-tax.

F.B.

Commissioner of Income-tax, Madras v. Rajah of Bobbili.

B.V.V. —— *Question answered against the assessee.*

PRIVY COUNCIL.

[On appeal from the Court of Resident in Mysore.]

PRESENT:—LORD ROCHE, SIR SHADI LAL AND SIR GEORGE RANKIN.

A. V. Palanivelu Mudaliar .. *Appellant**

v.

Neelavathi Ammal and another .. *Respondents.*

P.C.

Palanivelu Mudaliar v. Neelavathi Ammal.

Evidence—Burden of proof—Promissory note—Undue influence—Good faith—Remuneration for services rendered—Intention at the time of rendering the service—Proper party to state such intention—Evidence as to conduct consistent with knowledge of expectation of remuneration for services rendered—Indian Evidence Act (I of 1872), S. 111—Indian Contract Act (IX of 1872), Ss. 16, 70.

In January, 1925, the defendants, who were three sisters, executed in favour of the plaintiff, who was married to defendant No. 1, a promissory note for Rs. 15,000, for services rendered by him in the management of their joint estate. No payment being made, he sued the defendant for the principal and interest due on the promissory note, and, alternatively, for remuneration for services rendered. The defendants' father died leaving a large estate of several immovable properties, in which his collaterals were interested, and they offered the defendants a stubborn resistance leading to protracted proceedings before arbitrators. The defendants were represented by their maternal uncle, but owing to the unsatisfactory state of the accounts kept by him he was removed from his office as the manager. As a reward for his work the defendants agreed to give him a house worth Rs. 9,000 and they then requested the plaintiff to take over the management of the estate. The plaintiff, who was then a young man, gave up his studies to take over the management, and undertook a variety of duties on behalf of defendants for about 8 years and he not only brought the arbitration proceedings to a successful termination but recovered for them an estate worth four lacs of Rupees. The defendants however resisted the suit on the promissory note on the ground of undue influence.

Held, that under the peculiar circumstances of the case the onus of proving good faith was upon the plaintiff, both under S. 111 of the Indian Evidence Act and S. 16 of the Indian Contract Act and that as he had failed to discharge the onus the claim on the promissory note failed.

Held, however, allowing the plaintiff's alternative claim for remuneration for services rendered, that the question of compensation depended upon the intention of the plaintiff at the time of his doing the thing for which he demanded compensation, that he was the proper person to state what his intention was and that it could not be predicated that he intended to act gratuitously if he was under the impression that he would receive remuneration for

* P. C. Appeal No. 20 of 1935. 26th January, 1937.

P.C.

Palanivelu Mudaliar v. Neelavathi Ammal.

his services. The conduct of the defendants was also compatible only with the hypothesis that they knew he must be paid and consequently they were liable to pay the plaintiff compensation.

Decree of the Court of the Resident of Mysore modified.

This is an appeal from decrees of the Court of the Honourable the British Resident in Mysore dated 30th November, 1931 and 18th July, 1932, which reversed judgments of the District Judge, Civil and Military Station, Bangalore, dated 21st November, 1928 and 19th April, 1932. The facts appear from the judgment of their Lordships.

L. M. DeSilva, K.C. (*of the Colombo Bar*) for Appellant.

A. M. Dunne, K.C. and *C. Sidney Smith* for Respondents.

26th January, 1937. Their Lordships' judgment was delivered by

Sir Shadi Lal.

Sir Shadi Lal.—On the 26th January, 1925, three sisters, who were the defendants in the action which has led to this appeal, executed in favour of the plaintiff a promissory note for Rs. 15,000. They agreed to pay him this sum, for the services rendered by him in the management of their joint estate, with interest at the rate of 1 per cent. per mensem from the date of the note until the date of payment. No payment was, however, made to him, with the result that he commenced in January, 1928, the present action to recover Rs. 20,000, the principal and interest due on the document; and in the alternative he claimed that amount as remuneration for his services from March, 1920, to January, 1928.

The first defendant, who was married to the plaintiff, did not contest the suit; but her two younger sisters denied the due execution of the promissory note by them, and raised other pleas to defeat the claim. On the issues, which arose on the pleadings, the Trial Judge pronounced his judgment in favour of the plaintiff, and granted a decree for the amount claimed by him with costs. Against that decree, the two contesting defendants preferred an appeal, which was allowed by the Court of Appeal, and the suit was dismissed with costs as against them. But a decree was granted for one-third of Rs. 20,000 against the first defendant who had not disputed her liability in either of the two Courts.

From the decree of the Appellate Court the plaintiff has brought this appeal against the two younger sisters (hereinafter to be described as the respondents), who alone had

P.C.

Palanivelu Mudaliar v. Neelavathi Ammal.

Sir Shadi Lal.

resisted his suit in the Courts below. The first point for determination is whether he can maintain the suit on the promissory note.

The facts of the case relevant to the questions raised before their Lordships may be shortly stated. The defendants were the daughters of one Murugesa Mudaliar, who died in November, 1916, without leaving any male issue. He owned a large and valuable estate, and soon after his death disputes regarding the partition of the estate arose between his widow on the one side and his collaterals on the other side. These disputes were referred to arbitration, and the widow stood in need of the services of a reliable person who could represent her before the arbitrators. She had a brother, Neela Kanta Mudaliar; and he consented, and was authorised, to act on her behalf in the arbitration proceedings. He did not, however, prove to be either efficient or honest in the discharge of his duties; and after the death of the widow his services were dispensed with in March, 1920.

It was at this stage that the plaintiff was asked by the defendants to take over the management of the estate and to carry on the proceedings before the arbitrators. He acceded to their request, and managed the estate, and acted as their agent in other affairs from March, 1920, until the institution of the suit in January, 1928. After he had worked for five years, he demanded his remuneration for the services performed by him, and the defendants, who had no money to pay at that time, executed the promissory note in question for Rs. 15,000. The note was admittedly signed by all the defendants, but the respondents sought to avoid their liability on various grounds. It is, however, unnecessary to mention here all the pleas advanced by them, because they were over-ruled by the Trial Judge, and his decision has been endorsed by the Court of Appeal, save in respect of the plea of undue influence. As regards the claim on the note the learned counsel for the parties have confined their arguments to this defence, and after considering the matter their Lordships are not prepared to dissent from the conclusion reached by the Court of Appeal.

The onus of proving undue influence ordinarily rests on the party who sets up that plea, but the circumstances of this case make it an exception to the general rule. As stated above, the plaintiff was married to the eldest sister, and it

P.C.
Palanivelu Mudaliar *v.* Neelavathi Ammal.
Sir Shadi Lal.

appears that she was in a position to influence her younger sisters. They had lost, not only their father, but also their mother, before they signed the document promising to pay a large rum of money. It is true that both of them were *sui juris* at that time, but the youngest girl had attained her majority only about a month or two before she was asked to sign the promissory note.

But the circumstance, which has an important bearing upon the issue of undue influence, is that the plaintiff as their agent stood to them in a position of active confidence. As enacted by S. 111 of the Indian Evidence Act, I of 1872, the burden of proving the good faith of the transaction is on the party who was in a position of active confidence.

It is admitted by the plaintiff that he had got a draft of the promissory note prepared by a lawyer, and then dictated it to the second sister, who wrote the note so dictated to her. Such procedure is plainly open to exception. Moreover, the note makes all the executants jointly and severally liable for the payment of the entire sum, and this covenant would enable him to recover the whole of the amount from either of the two younger sisters, leaving her to demand contribution from the other sisters, a remedy which might be of doubtful efficacy.

In view of these facts their Lordships agree with the Appellate Court that the plaintiff was in a position to dominate the will of each of the respondents, and that the necessary proof of good faith was not forthcoming. Whether the case comes within the purview of S. 111 of the Indian Evidence Act, or S. 16 of the Indian Contract Act, IX of 1872, the onus in either case was upon him; and he has failed to discharge it.

The claim on the basis of the promissory note has been rightly dismissed as against the respondents. But as laid down by S. 19-A of the Indian Contract Act, "when consent to an agreement is caused by undue influence, the agreement is a contract voidable at the option of the party whose consent was so caused." It will be observed that the contract is not void but merely voidable; and it is binding upon the first defendant, whose consent was not caused by undue influence. Indeed, she not only did not raise the plea of undue influence, but admitted her liability on the promissory note. The Trial Judge gave a

P.C.

Palanivelu Mudaliar v. Neelavathi Ammal.

Sir Shadi Lal.

decree for the money due on the document, and from that decree only her younger sisters preferred an appeal. As she did not challenge the decree, the Court of Appeal, endorsing the finding of the Trial Court that she was liable to satisfy one-third of the claim, upheld the decree against her for Rs. 6,666, annas 10, and pies 8. It is only the plaintiff who has brought this appeal, and there is no suggestion either by him, or by the respondents, that the decree against the consenting defendant should, in any way, be modified. Indeed, she is not a party to this appeal, and the decree against her must be maintained.

But whilst the appellant thus fails to enforce his claim on the promissory note against the respondents, this failure does not involve the dismissal of his alternative claim to recover remuneration for the services rendered by him to them. In support of this claim he invokes S. 70 of the Indian Contract Act, which is in these terms:—

> "Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered."

It is not disputed that the plaintiff rendered services to the respondents lawfully, and that the latter enjoyed the benefit thereof. The only question is whether while doing their work he did not intend to act gratuitously. On this issue there is a difference of opinion between the Courts in India; the Trial Judge found in favour of the appellant, but his view was not accepted by the Court of Appeal. To determine the question their Lordships must examine all the circumstances which have a bearing upon it.

There can be little doubt that the task, which he undertook in March, 1920, in pursuance of the request of the defendants, was not an easy one. It appears that the estate left by their father consisted of a share in several immovable properties, in which his collaterals also were interested. They contested the claim of his heirs to their share of the estate, and the latter had to face a stubborn resistance. The disputes were referred to arbitration, but the proceedings before the arbitrators were complicated as well as protracted. The maternal uncle, who originally represented them, had not worked satisfactorily, and the accounts kept by him were found to be inaccurate. He was, therefore, removed from the office of the manager, and it was

P.C.
Palanivelu Mudaliar v. Neel vathi Ammal.
Sir Shadi Lal.

then that the plaintiff consented to take over the management of their estate and to look after their affairs. He served them for nearly eight years, and during that period he not only brought the arbitration proceedings to a successful conclusion and recovered for them an estate worth more than Rs. 4,00,000, but also rendered numerous other services. These services are set out in the judgment of the Trial Judge and need not be recapitulated here. Suffice it to say, that he undertook a variety of duties which, performed, as they were, with honesty and assiduity, proved beneficial to the defendants.

Now, the question of whether compensation should, or should not, be awarded must depend upon the intention of the appellant at the time of his doing the thing for which he demands the compensation. He is, obviously, the proper person to state what his intention was; and his testimony on this matter deserves consideration. What does he say? In his deposition before the Court he gives a long list of the multifarious duties performed by him during the period of eight years, and relates the benefits derived by the defendants from his services. He makes it clear that he was under the impression that he would receive remuneration for those services and it cannot be predicated about a person who expected remuneration that he intended to act gratuitously.

The plaintiff's evidence was believed by the Trial Judge, who had the advantage of observing the demeanour of the witness; but the learned Judge of the Court of Appeal does not think that he, being the husband of one of the sisters and the brother-in-law of the other two sisters, did the work "with the expectation of some remuneration." This argument cannot be sustained, especially as it is not in harmony with the circumstances of the case. It must be remembered that the appellant was a young man, who had passed the first part of the examination prescribed for the B.A. degree, and was preparing for the final part of that examination. Was it likely that he would give up his studies and throw away all prospects of a career in life, in order to undertake, without expecting any remuneration, the laborious and tedious task of recovering their estate from their opponents, who were both formidable and resourceful? He knew that Neela Kanta Mudaliar had already failed in the performance of the work, and while the society, to which the defendants belonged, may expect the

maternal uncle to help his nieces without any payment, no such sacrifice can reasonably be contemplated from a person occupying the position of a son-in-law. Indeed, neither the parents-in-law nor the members of their family would, unless afflicted with poverty, consider it in consonance with their sense of honour or propriety, if they failed to reward him for the work which required labour and time for its performance. It is significant that even the maternal uncle was to receive as a reward for his work a house worth about Rs. 9,000.

It is unreasonable to assume that the appellant, cognizant, as he was, of all these facts, consented to take over the arduous work, intending to do it without any payment, simply because he was married to one of the sisters. The estate was a valuable one, and the sisters were in affluent circumstances. His wife was entitled to only one-third of the estate, and even if he did not desire to be paid for the work done for her, he could adopt the course, which was likely to receive her approbation, of getting full remuneration for his services and then remitting to her one-third of the total amount received by him. This course would have the merit of his serving the wife without any payment, and recovering, at the same time, compensation for the time and labour devoted by him to the work of her sisters. They were undoubtedly in a position to pay, and, knowing, as they did, all the circumstances including the social sentiment as to such a matter they would not expect him to do their work without charging any remuneration.

The main ground, upon which the Appellate Court dissented from the Trial Court, cannot, therefore, be supported. Indeed, the circumstances relating to the execution of the promissory note in 1925 show that he did not intend to act gratuitously. It is clear that in January, 1925, he made a demand for the payment of his remuneration, but the sisters had no money to pay at that time, and gave the promissory note for the amount then due to him. The Court of Appeal thinks that it shows that "the idea of being remunerated appears first to have come to him in January, 1925"; but what happened at that time proves much more than the fact that he did not intend to work gratuitously thereafter.

It is common ground that he was living in the same house with the defendants from the very beginning, and the question of whether he expected to be remunerated or not for his work would naturally be mentioned during the period of his resid-

P.C.
Palanivelu Mudaliar v. Neelavathi Ammal.
Sir Shadi Lal.

ence. Their conduct is consistent with a knowledge of his expectations, when in 1925 he demanded remuneration for the work which he had done since March, 1920. There can be little doubt that, if he had told them or led them to believe that he was working gratuitously for them, they would have protested against his *volte face* in 1925, and demurred to his demand. But there was apparently no such protest or objection by them. They merely expressed their inability to provide money at that time and signed the promissory note for "the sum of Rs. 15,000 for having managed" their estate. Their conduct at that time is compatible only with the hypothesis that the demand did not come to them as a surprise, and that they knew that he must be paid, and this knowledge must have come to them from him.

This aspect of the question, which has been inadequately appreciated by the Appellate Court, furnishes a strong corroboration of the appellant's testimony. Their Lordships hold that he did not intend to act for the respondents gratuitously, and that he has established his claim to a reasonable compensation.

What should be a reasonable compensation for the services which have been already described? This matter may be disposed of in a few words. The Courts in India are in agreement that he is entitled to be paid at the rate of Rs. 50 *per mensem* by each of the respondents for the period of his management, which amounts to about eight years. No objection has been, or can be, taken to this concurrent finding by the Courts below. The result is that the appellant should recover Rs. 4,800 from each of the two respondents, and that he must get also the costs of this appeal. In the Trial Court he shall get three-fourths of his costs from the contesting defendants, but there will be no order as to the costs incurred in the Court of Appeal in India. The costs, if any, recovered by the respondents in pursuance of the decree of the Appellate Court shall be refunded by them to the appellant.

Their Lordships will humbly advise His Majesty that the appeal be accepted *pro tanto*, and the decree of the Appellate Court modified accordingly.

Solicitors for Appellant: *Hy. S. L. Polak & Co.*

Solicitors for Respondents: *Douglas, Grant & Dold.*

R. C. C. —— *Appeal allowed*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR HORACE OWEN COMPTON BEASLEY, *Kt.*, *Chief Justice*, MR. JUSTICE VENKATARAMANA RAO AND MR. JUSTICE LAKSHMANA RAO.

Swaminathan *alias* Muthuvelu Udayar .. *Petitioner** (*2nd Respondent*)

v.

The Official Receiver of Ramnad at Madura and twenty-four others .. *Respondents* (*Petitioner and Respondents 1 and 4 to 25*).

F.B.

Swaminathan *v.* Official Receiver of Ramnad.

Civil Procedure Code (V of 1908), O. 33, r. 1 Explanation—Suit in forma pauperis *by Official Receiver—Whether his possession of sufficient means in his personal capacity could prevent his suing as a pauper.*

On the question whether an Official Receiver, in whom the estate of an insolvent vested by virtue of an order of adjudication can institute a suit as a pauper for recovery of the said estate,

Held, that the Official Receiver can be allowed to sue as a pauper, provided he fulfils the conditions laid down in the explanation to O. 33, r. 1 of the Civil Procedure Code, in respect of the estate on whose behalf he is suing. The fact that in his personal capacity he is possessed of sufficient means or he has other estates in his hands is immaterial.

Case-law reviewed.

Mitra v. *Corporation of Royal Exchange Assurance,* A.I.R. 1930 Rang. 259, dissented from.

The word 'person' in O. 33, r. 1, explained.

Petition under S. 115 of Act V of 1908 and S. 107 of the Government of India Act praying the High Court to revise the Order of the Court of the Subordinate Judge of Devakottai dated the 6th day of December, 1934 and made in O. P. No. 5 of 1934 (O. S. No. 231 of 1934 on the file of the Sub-Court, Devakottai).

K. S. Venkatarama Aiyar for Petitioner.

K. V. Krishnaswami Aiyar, C. A. Seshagiri Sastri, R. Kesava Aiyangar and *T. D. Srinivasachari* for Respondents.

The Court made the following

ORDER: *Venkataramana Rao, J.*—This case was admitted by Burn, J., on the ground that the question involved in the case is of some general importance. On the exact matter

---

* C. R. P. No. 113 of 1935. 15th March, 1937.

F.B. Swaminathan v. Official Receiver of Ramnad.

in question, there seems to be some difference of opinion. A Bench of the Rangoon High Court in *Mitra* v. *Corporation of Royal Exchange Assurance*[1] has taken the view that an Official Receiver cannot be allowed to sue as a pauper where he himself is possessed of sufficient funds to carry on the suit. A different view has been taken by the Allahabad High Court in *Mohammad Zaki* v. *The Municipal Board of Mainpuri*[2]. The nearest analogy in my opinion seems to be the case of an executor in regard to which the preponderance of opinion in this Court has been that he can be permitted to sue as a pauper if the estate which he represents, does not possess sufficient funds to carry on the suit—vide *Sivagami Ammal* v. *Gopalaswami Odayar*[3] and *Ammakannammal* v. *Damodara*[4]. A different view has been taken by Jackson, J., in *A. S. Radhakrishna Aiyar*, In re,[5] where I find the one side was not represented. I therefore think it desirable that this matter should be decided by a Bench. I accordingly refer this Civil Revision Petition to a Bench for disposal.

The case then came on for hearing before the Full Bench as constituted above.

The judgment of the Court was delivered by

Venkataramana Rao, J.

Venkataramana Rao, J.—The question raised in this Civil Revision Petition is whether an Official Receiver, in whom the estate of an insolvent vested under S. 28, cl. 2 of the Provincial Insolvency Act by virtue of an order of adjudication made by the Court, can institute a suit as a pauper for the recovery of the said estate. The decision turns upon the construction of O. 33, r. 1, Civil Procedure Code, which runs thus:

"Subject to the following provisions, any suit may be instituted by a pauper".

Explanation.—"A person is a 'pauper' when he is not possessed of sufficient means to enable him to pay the fee prescribed by law for the plaint in such suit, or, where no such fee is prescribed, when he is not entitled to property worth one hundred rupees other than his necessary wearing apparel and the subject-matter of the suit".

The point now in controversy is where an Official Receiver is a "person" within the meaning of the above explanation. There is no definition of 'person' in the Civil Procedure Code. *Prima facie*, the interpretation of the said term in the General Clauses Act would apply, according to which a

1. A.I.R. 1930 Rang. 259.
2. (1918) 16 A.L.J. 440.
3. (1924) 48 M.L.J. 390.
4. A.I.R. 1928 Mad. 66: 109 I.C. 258.
5. (1924) 88 I.C. 91: 6 P.L.T. 380.

F.B.

Swaminathan v. Official Receiver of Ramnad.

Venkataramana Rao, J.

" person " shall include any company or association or body of individuals, whether incorporated or not. This connotes that 'person' would include both natural and legal persons. This is in strict accordance with the conception of a person in law. In his book of 'Jurisprudence' (8th Edition) at page 329, Salmond observes thus:

" So far as legal theory is concerned, a person is any being whom the law regards as capable of rights or duties. Any being that is so capable is a person, whether a human being or not, and no being that is not so capable is a person, even though he be a man. Persons are the substances of which rights and duties are the attributes. It is only in this respect that persons possess juridical significance, and this is the exclusive point of view from which personality receives legal recognition. Persons as so defined are of two kinds, distinguishable as natural and legal".

He further points out that a natural person is capable of a double personality. At page 335, he explains it thus:

"It often happens that a single human being possesses a double personality. He is one man, but two persons. *Unus humo*, it is said, *plures personas sustinet.* In one capacity, or in one right, as English lawyers says he may have legal relations with himself in his other capacity or right. . . . . This double personality exists chiefly in the case of trusteeship. A trustee is, a person in whom the property of another is nominally, *i.e.*, technically vested, to the intent that he may represent that other in the management and protection of it. A trustee, therefore, is for many purposes two persons in the eye of the law. In right of his beneficiary he is one person, and in his own right he is another".

An Official Receiver satisfied this conception of a person. The estate of the insolvent is vested in him to the intent that he may represent the insolvent and realise the estate and administer it in accordance with the provisions of the Act. He is thus clothed with the representative character of trustee. As Lord Selborne pointed out in *Pharmaceutical Society* v. *London and Provincial Supply Association*[1]:

" There can be no question that the word 'person' may and . . . . *prima facie* does, in a public statute, include a person in law; that is, a Corporation, as well as a natural person. But although that is a sense which the word will bear in law, and which, as I said, perhaps ought to be attributed to it in the construction of a statute unless there should be any reason for a contrary construction, it is never to be forgotten, that in its popular sense and ordinary use it does not extend so far".

The same view was taken by Lord Blackburn at pages 868 and 869. Unless therefore the context and the object of the enactment requires otherwise, 'person' in O. 33, r. 1, Civil Procedure Code, should have the extended meaning given to it in law. Under O. 33, r. 1, any suit may be instituted by a pauper, that is, the intended plaintiff in a suit can be a pauper.

1. (1880) L.R. 5 A.C. 857 at 861.

F.B.

Swaminathan v. Official Receiver of Ramnad.

Venkataramana Rao, J.

Suits under the Civil Procedure Code can be instituted not only by natural human beings but also by artificial persons such as a corporation or an idol and also by persons like executors, administrators, trustees and official receivers who represent the estate of another. *Prima facie*, therefore, having regard to the scheme of the Code, the context and object of the enactment would not exclude an official receiver from the category of persons within the meaning of the said rule. But it is contended that by reference to the necessary wearing apparel in the Explanation and the necessity of the presentation of the application by the applicant in person, it can only contemplate a natural person. We think this contention is sufficiently met by the observations of Kumaraswami Sastri, J., in *Perumal Koundan* v. *Thirumalarayapuram Jananukoola Dhanasekara Sanka Nidhi*[1]. Dealing with the argument with reference to the wearing apparel, he observes thus:

> "The explanation simply allows deduction of the value of wearing apparel and can only mean that if the applicant has necessary wearing apparel he can deduct its value. We do not think it can be construed to mean that only persons who in law can possess wearing apparel, can sue as paupers . . ."

In regard to the physical presence of the applicant and his examination contemplated in the Code, the learned Judge observes thus:

> "Rule 3 of O. 33 of the Civil Procedure Code, in our opinion, only prohibits a pauper who is competent in law to appear in person from taking advantage of O. 33 of the Civil Procedure Code and appearing by a pleader or recognised agent instead of being present personally. It does not cover cases where from the nature of the case physical presence is impossible or where the law, owing to any disability, directs that all acts required by the Code should be performed by a next friend".

In a very early decision of the Madras High Court the word 'person' was understood as including persons in a fiduciary character. In *In re Bill*[2] in accordance with this interpretation, an administrator was held entitled to sue *in forma pauperis*. This interpretation was never departed from, excepting in one case decided by Jackson, J., in *A. S. Radhakrishna Aiyar*, In re,[3] where the learned Judge seems to follow the decision in *Manaji Rajuji* v. *Khandoo Baloo*[4] which has taken a contrary view. In *Sivagami Ammal* v. *Gopalaswami Odayar*[5] it was pointed out following *In re Bill*[2] that the word

---

1. (1917) 34 M.L.J. 421: I.L.R. 41 Mad. 624.
2. (1884) I.L.R. 7 Mad. 390.
3. (1924) 88 I.C. 91.
4. (1911) I.L.R. 36 Bom. 279.
5. (1924) 48 M.L.J. 390.

F.B.
Swaminathan v. Official Receiver of Ramnad.
Venkataramana Rao, J.

'person' in O. 33, r. 1, indicates a juridical person and that an executor can sue *in forma pauperis.* This is also the view taken by Kumaraswami Sastri, J. In *Ammakannammal* v. *V. K. Damodara Mudaliar*[1] (a case of an executor) and in *Perumal Koundan* v. *T. J. Dhanasekara Sanka Nidhi*[2] (a case of an Official Liquidator). In a recent decision dealing with a case of mutawalli reported in *Srimati Mabia Khatun* v. *Sheikh Satkari*[3] Ghose and Cammiade, JJ., observed that the capacity of a person suing in a representative character must be kept distinct from his personal capacity and that a mutwalli, trustee or a shebait can be allowed to sue *in forma pauperis.*

The argument that was strongly pressed upon us and based on *S. M. Mitra* v. *Corporation of the Royal Exchange Assurance*[4] is that as the property vests in the Official Receiver and he is the legal owner of the insolvent estate, he cannot be allowed to sue *in forma pauperis.* The test is not whether a person is the legal owner, but whether as legal owner he is a pauper or not. If the principle of law is that a natural person in his own right is a different person when he is representing the estate of another, the test is whether in that representative character and as owner of that estate he is a pauper within the meaning of the explanation of O. 33, r. 1. The said decision again does not draw a distinction between legal ownership vesting in a person by virtue in a person by virtue of his fulfilling the representative character and so long as he fulfils the representative character and the legal ownership vesting in a person by virtue of succession or inheritance. The case in *Mohammad Zaki* v. *Municipal Board of Mainpuri*[5] also is in favour of the view that an Official Receiver can sue as a pauper. The case in *Manaji Rajuji* v. *Khandoo Baloo*[6] relied on is the one where Devar, J., held that an executor was not entitled to sue *in forma pauperis* on the ground that he in his individual capacity was not a pauper. The ground assigned was that "the privilege of maintaining a pauper suit is a personal privilege granted to people who have no means of carrying on or continuing litigation". This decision proceeds on the assumption that the 'person' referred to in explanation to O. 33, r. 1, can only refer to a person suing

1. A.I.R. 1928 Mad. 66.
2. (1917) 34 M.L.J. 421: I.L.R. 41 Mad. 624.
3. (1926) 100 I.C. 264.
4. A.I.R. 1930 Rang. 259.
5. (1918) 16 A.L.J. 440.
6. (1911) I.L.R. 36 Bom. 279.

F.B.
Swaminathan
v.
Official Receiver of Ramnad.
Venkataramana Rao, J.

in his own right and not to a person suing in a representative character or to an artificial person. The learned Judge notices in the same case that it was conceded before him that an executor could not institute a suit *in forma pauperis*. This is the English rule but that rule is not applicable in India, as pointed out in *In re Bill*[1] which we prefer to follow.

We are therefore of the opinion that the Official Receiver in this case can be allowed to sue as a pauper, provided he fulfils the conditions laid down in the Explanation to O. 33, r. 1, Civil Procedure Code. The case is therefore remanded to the lower court for the determination of the question whether the petitioner satisfies the condition laid down in the Explanation to O. 33, r. 1, Civil Procedure Code and for disposal accordingly. Costs will abide the result.

K. C. — *Petition allowed and Case remanded.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR HORACE OWEN COMPTON BEASLEY, *Kt.*, *Chief Justice*, MR. JUSTICE VARADACHARIAR AND MR. JUSTICE KING.

The Secretary of State for India in Council represented by the Collector of West Godaveri .. *Appellant* in S. A. No. 1433 of 1931 on the file of the High Court (Defendant)*

v.

Bayisetti Veeranna and others .. *Respondents (Respondents in do.—Plaintiff's L. Rs.).*

F.B.
Secretary of State for India in Council
v.
Veeranna.

Madras Irrigation Cess Act (VII of 1865), S. 1 (b) proviso—Words "Irrigated by using without due authority," interpretation of.

The expression 'irrigated by using without due authority' in proviso to S. 1 of the Madras Irrigation Cess Act can reasonably be held to contemplate a voluntary user, that is, with a preconceived purpose or at least an intention so to use the water. In substance, the provision in respect of unauthorised or improper use is one in the nature of a penalty and the mere fact that sub-clause (*b*) of the enacting portion of the section was intended to apply to even cases of involuntary irrigation will not justify putting upon the language of the proviso a construction which is wholly at variance with the implication of the word 'use' or the reference to 'due authority'.

---

1. (1884) I.L.R. 7 Mad. 390.

* L. P. A. No. 10 of 1936. 17th December, 1936.

F.B.

Secretary of State for India in Council *v.* Veeranna.

Where a person alleged that water cess was illegally levied from him and the facts found were that wet lands of the person who was a ryotwari holder had the benefit of water for about 24 hours through a breach in an irrigating channel and that he had nothing to do with the breach so caused,

Held, that the plaintiff was not liable to be charged water cess.

A course of decisions in this Court had uniformally held the word 'used' appearing in different portions of the Act clearly contemplated voluntary user.

Kanniappa Mudaliar v. *Secretary of State for India*, (1935) 69 M.L.J. 728: I.L.R. 59 Mad. 107, followed.

Appeal under cl. 15 of the Letters Patent against the judgment of the Hon'ble Mr. Justice Pandrang Row dated 23rd October, 1935 and passed in S. A. No. 1433 of 1931 preferred to the High Court against the decree of the Court of the Subordinate Judge of Ellore in A. S. No. 213 of 1930 preferred against the decree of the Court of the District Munsif of Kovvur in O. S. No. 562 of 1927.

Government Pleader (*K. S. Krishnaswami Aiyangar*) for Appellant.

O. T. G. Nambiar amicus curiæ.

The judgment of the Court was delivered by

Varadachariar, J.

Varadachariar, J.—This Letters Patent Appeal arises out of a suit for recovery of water cess which the plaintiff alleges was illegally levied from him. The facts found are that the wet lands of the plaintiff who is a ryotwari holder received water for about 24 hours in August, 1926, through a breach in the channel while the source of irrigation assigned to these lands was a sluice in the channel and that the plaintiff had nothing to do with the breach and was not even aware of it. On these findings of fact, our learned brother Pandrang Row, J., before whom this second appeal came in the first instance followed the judgment of a Division Bench reported in *Kanniappa Mudaliar* v. *Secretary of State for India*[1] and held that the plaintiff was not liable to be charged water cess. This letters patent appeal was posted before a bench of three Judges as it was represented on behalf of the Government that the decision in *Kanniappa Mudaliar* v. *Secrctary of State for India*[1] required further consideration.

The matter has now been argued before us fully by the Government Pleader; and we are indebted to Mr. Nambiar who had kindly agreed to represent the other side as *amicus curiae.* It is not disputed that the case is directly governed

1. (1935) 69 M.L.J. 728: I.L.R. 59 Mad. 107.

F.B.

Secretary of State for India in Council v. Veeranna.

Varadachariar, J.

by the decision in *Kanniappa Mudaliar* v. *Secretary of State for India*[1] so far as the effect of the second proviso to S. 1 of the Madras Irrigation Cess Act is concerned. There are certain observations in that judgment bearing upon the relative scope of clauses (*a*) and (*b*) of S. 1 of the Act and their relation to each other to which the learned Government Pleader took exception. It is not necessary for the purposes of this case for us to express any opinion upon the correctness or otherwise of those observations. Assuming for the moment that the present case falls under clause (*b*) it is sufficient to say that we agree with the opinion of the learned Judges so far as their interpretation of the second proviso to the section is concerned, namely, the one relating to the immunity of ryotwari holders of land classified as wet.

The expression 'irrigated by using without due authority' can reasonably be held to contemplate a voluntary user, that is, with a preconceived purpose or at least an intention so to use the water. In substance, the provision in respect of unauthorised or improper user is one in the nature of a penalty and the mere fact that sub-clause (*b*) of the enacting portion of the section was intended to apply even to cases of involuntary irrigation will not justify putting upon the language of the proviso a construction which is wholly at variance with the implication of the word 'use' or the reference to 'due authority'. As pointed out by the learned Judges who decided in *Kanniappa Mudaliar* v. *Secretary of State for India*[1] a course of decisions in this Court had uniformly held that the word 'used' appearing in different portions of the Act clearly contemplated voluntary user. When in 1900 the legislature proposed to enable the Government to levy cess even in respect of involuntary irrigation, the legislature did not indicate its intention to depart from the proper or declared significance of the word 'used' but adopted different phraseology in clause (*b*) to cover cases of involuntary irrigation. We are, therefore, of opinion that even the policy of the legislation of 1900 would not justify us in putting upon the expression "using without due authority" a different interpretation from that adopted in the earlier cases. The letters patent appeal fails and is dismissed.

K. C. —— *Appeal dismissed.*

1. (1935) 69 M.L.J. 728: I.L.R. 59 Mad. 107.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE GENTLE.

V. Lalithambal Ammal .. *Petitioner**

v.

The Guardian of India Insurance Co., Ltd. and others .. *Respondents.*

Lalithambal Ammal *v.* Guardian of India Insurance Co., Ltd.

Insurance—Policy taken by husband—Wife of the assured mentioned as the person to be ultimately benefited in case of predeceasing of the assured—Assignment of policy during assured's lifetime in favour of Bank—Subsequent death of assured—Wife claiming benefit of policy—Assignment will hold good and Bank's claim satisfied.

One *V. S.* effected a policy of insurance with a company upon his life and the schedule to that policy provided that the amount payable upon his death was Rs. 2,000. Under the heading ' for whose benefit and to whom payable' were the words 'the assured or his wife, if he predeceases her.' The assured died during the currency of policy. Only Rs. 1,000 was in fact payable under the policy. During his lifetime two days after effecting the policy the assured by an endorsement assigned to a certain bank all the benefits under the policy for valuable consideration. The widow, the petitioner, claimed that upon the effecting of the policy a trust came into existence at once in her favour and that by the assignment of the benefit of the policy to the bank the deceased was trying to do what in fact he had no power to and hence she claimed the money.

Held, that there was no vested interest of the petitioner in the subject-matter of the policy until the happening of the event which, the policy contemplated, should happen before she had the interest, namely, the death of the husband. It followed therefore that during his life he was not fettered by any trust, as a trust would only arise upon his death. Therefore when he executed the assignment to the bank he was entitled to do so and that having been so, it was of full effect and the petitioner was not entitled to payment by the insurance company of Rs. 1,000. The bank were the persons to whom the money was payable.

In re *Fleetwood's Policy,* (1926) 1 Ch. 48 and *Cousins* v. *Sun Life Assurance Society,* (1933) 1 Ch. 126, referred to.

In re *Ioakimidis' Policy Trusts*: *Ioakimidis* v. *Hartcup,* (1925) 1 Ch. 403 at 406, relied on.

A. V. Seshayya for Petitioner.

Dr. V. K. John for *C. M. Kuruvilla* and *N. Nagarajan* for Respondents.

The Court delivered the following

JUDGMENT.—On the 11th May, 1935, one V. Sundaresayya effected a policy of insurance No. 1113 with the Guardian of India Insurance Co., upon his life and the schedule to that policy provides that the amount payable upon his death is Rs. 2,000. Under the heading " For whose benefit and to whom payable" are the words "the assured or his wife Mrs. V.

* O. P. No. 223 of 1936. 16th October, 1936.

Lalithambal Ammal v. Guardian of India Insurance Co., Ltd.

Lalithambal if he predeceases her ". The assured died on the 7th March, 1936, during the currency of the policy. It is conceded that in fact only Rs. 1,000 is payable under this policy. During her life time, namely, two days after effecting the policy the assured by an endorsement on the back of the policy assigned to the Travancore National Bank all the benefits under the policy for valuable consideration. The widow, the petitioner in this petition, claims that upon the effecting of this policy a trust immediately came into existence in her favour and that by the assignment of the benefit of the policy to the Travancore Bank the deceased was trying to do what in fact he had no power to undertake and she claims that the money, the Rs. 1,000 should be paid to the Official Trustee to hold on her behalf and should not be paid to the Travancore Bank. The insurance company are defendants with the Travancore Bank but they are merely so in order that any order that may be made regarding payment can be effectively carried out. The matter is the subject of S. 6 of the Indian Married Women's Property Act, 1874, as amended by Act XIII of 1923. S. 6 of the Act provides:

" A policy of insurance effected by any married man on his own behalf and expressed on the face of it to be for the benefit of his wife or of his wife and children or any of them shall enure and be deemed to be a trust for the benefit of his wife or of his wife and children or any of them according to the interest so expressed and shall not, so long as any object of the trust remains, be subject to the control of the husband or to his creditors or form part of his estate.

When the sum secured by the policy becomes payable, it shall, unless special trustees are duly appointed to receive and hold the same, be paid to the Official Trustee of the Presidency ".

This section save in regard to appointment of special trustees or of the Official Trustee of the Presidency is similar in effect, although not identically worded to S. 10 of the Married Women's Property Act, 1820, as amended by S. 11 of the English Married Women's Property Act of 1882. It is important to remember that under this policy it is expressed to be for the benefit of and to be payable to the assured or his wife, that is to say, the petitioner here if the assured predeceases the wife. It is contended on behalf of the petitioner that immediately upon the policy coming into existence a trust arose in her favour and that trust subsists right through all the relevant period. On the other hand, Dr. John on behalf of the Bank contends that a trust never arose but if such a trust arose it arose only upon the happening of the event

Lalithambal Ammal *v.* Guardian of India Insurance Co., Ltd.

which would give rise to it, namely, the death of the assured and until his death there was no trust in being. I have been referred to several decisions of the English Courts, namely, In re *Ioakimidis' Policy Trusts*: *Ioakimidis* v. *Hartcup*[1], In re *Fleetwood's Policy*[2] and *Cousins* v. *Sun Life Assurance Society*[3], decisions upon the Married Women's Property Act of 1882. In *Cousins* v. *Sun Life Assurance Society*[3], the policy was effected by the husband upon his own life expressed to be for the benefit of his wife named in the policy and the decision of the Court was that in the policy effected in that way the wife took an immediate vested interest. Romer, L.J., does visualise the position of a policy being effected upon the life of a husband for the benefit of his wife. The wife can obtain an interest only subject to the happening of an event. At p. 139 he says:—

"Looking at the two points in this case, I find that they are expressed to be for the benefit of the testator's wife Lillian Cousins. That being so, there is a trust created in favour of Lillian Cousins. I can see nothing in the Act that would warrant us coming to the conclusion that the husband cannot, by means of this section, provide a vested interest for his wife and his children during her own lifetime but can only provide interests for them contingent on their surviving him. In the policies themselves I cannot find the remotest indication that the husband intended the wife's interest to be contingent on her surviving him. If he had so wished nothing was easier than for him to have said so in the policies themselves. In my opinion, therefore, there was a trust created in favour of the named wife, Lillian Cousins".

As I said that policy was effected on his life for the benefit of his wife and for no other person's benefit save, that if the wife died, it may be that it would have accrued to the benefit of her estate. In In re *Fleetwood's Policy*[2], the insurance was payable to the wife of the assured or in the event of her prior death to the assured's executors. Here again this policy of insurance was for the benefit of the wife and the provision of the payment to the husband's executors in the event of the wife's predeceasing him was a provision which one would expect to find upon the failure of the real object of the insurance. In the third English case of Ioakimidis' Policy Trusts a husband effected a policy upon his own life for a 20 years' endowment period and it was expressed to be for the benefit of his wife if the assured died within the 20 years leaving her surviving. Otherwise it was for the benefit of himself or his estate. Astbury, J., at p. 406 says this:—

1. (1925) 1 Ch. 403.
2. (1926) 1 Ch. 48.
3. (1933) 1 Ch. 126.

Lalithambal Ammal *v.* Guardian of India Insurance Co., Ltd.

"In the present case the benefit expressed for the wife was operative only in a specified event, namely, in the event of the husband dying before 28th May, 1938, leaving her surviving. That in my opinion was a policy effected by the husband on his own life and expressed to be for the benefit of the wife in the event mentioned. It created a statutory trust for the wife in that event only, namely, if the husband died before 28th May, 1938, leaving her surviving."

His view undoubtedly is that when the wife's interest arises only upon the happening of an event there is no vesting of that interest until the event anticipated in fact does arise. Here the payment is in the first instance to the assured and the contingency of his predeceasing his wife is the second provision in the relevant schedule of the policy. I have been referred to *Dinbai Hormasji Mirapurwala* v. *Bamanshaji Jamasji Shet*[1] by learned Counsel on behalf of the Travancore Bank. To my mind that case is entirely irrelevant to the point before me, because there the policy had been expressed to be for the benefit of the wife and it would appear that when the judgment of Divatia, J., at p. 519 was pointed out to Dr. John he accepted the position that that case did not assist him. For the reasons which I have given, in my judgment, there was no vested interest of the petitioner in the subject-matter of this policy until the happening of the event which, the policy contemplates, must happen before she has the interest, namely, the death of the husband. It follows therefore that during his lifetime he was not fettered by any trust as a trust would only arise upon his death. Therefore when he executed the assignment to the bank he was entitled so to do and that being so, it is of full effect and the petitioner is not entitled to payment by the insurance company of the Rs. 1,000 which is the amount agreed under the policy to be payable to the person entitled. In my judgment the Travancore Bank are the persons to whom the money is payable and they are entitled to be paid the amount under the provisions of the policy and the effect of the assignment of the 13th May, 1935. It is however admitted by learned Counsel on behalf of the Travancore Bank that although the wording of the assignment is of an absolute nature, nevertheless the Bank desires to be paid only the sum which the deceased was indebted to them during his lifetime and if this indebtedness is less than Rs. 1,000 the petitioner is entitled to any balance that there

1. (1933) I.L.R. 58 Bom. 513.

may be found after taking an account. The result therefore is that this petition is dismissed with costs, of respondents 1 and 2.

Lalithambal Ammal v. Guardian of India Insurance Co., Ltd.

K. C. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE MOCKETT AND MR. JUSTICE HORWILL.

Amina Bibi .. *Petitioner* (Plaintiff)*

v.

Kadir Batcha Rowther .. *Respondent (Defendant).*

Amina Bibi v. Kadir Batcha Rowther.

Court-Fees Act (VII of 1870 as amended in Madras), S. 7, cls. (iv) (*c*) *and* (v)—*Scope—Suit falling under special section of Act—Cl.* (*4*) (c) *of S. 7 as being inapplicable—Suit for declaration as to ownership and for possession —Prayer for possession as main relief—Court-fee payable.*

Where the consequential relief prayed for in a suit is such as to fall directly under some other section of the Court-Fees Act the suit should be valued under that special section and not under S. 7 (*iv*) (*c*) of the Act. Where the suit was for a declaration that a certain property gifted to the plaintiff by her husband, who subsequently became an insolvent, was her property and for possession of the property which had been taken possession of by the Official Receiver as part of the estate of her insolvent husband.

Held, that the plaint was leviable to court-fee under cl. (*v*) and not under cl. (*iv*) (*c*) of S. 7 of the Court-Fees Act.

Chinnammal v. *Madarsa Rowther*, (1903) 14 M.L.J. 343: I.L.R. 27 Mad. 480; *Arunachalam Chetty* v. *Rangaswami Pillai*, (1914) 28 M.L.J. 118: I.L.R. 38 Mad. 922 (F.B.) and *Maroof Sahib* v. *Ayyakannu Naicker*, (1934) 68 M.L.J. 755: I.L.R. 58 Mad. 1051, relied on.

Koraga Gowda v. *Somappa Gowda*, (1932) 36 L.W. 793 and In re *Sobhanadri Rao*, (1932) 63 M.L.J 759: I.L.R. 56 Mad. 314, doubted.

Petition under S. 115 of Act V of 1908 and S. 107, Government of India Act, praying the High Court to revise the order of the Court of the Additional Subordinate Judge of Coimbatore dated 23rd August, 1935, and made in C. M. A. No. 2 of 1935, preferred against the order of the Court of the District Munsiff of Dharapuram, dated 29th September, 1934, and made in O. S. No. 336 of 1933.

R. Desikan for Petitioner.

The Government Pleader (K. S. Krishnaswami Aiyangar) for the Government.

T. R. Ramachandran for Respondent.

The Court delivered the following

JUDGMENTS. *Horwill, J.*—A suit was brought for a declaration that a certain property gifted to the plaintiff by her husband, who subsequently became an insolvent, was her property and for possession of the property which had been taken

Horwill, J.

* C.R.P. No. 1413 of 1935. 20th January, 1937.

Amina Bibi v. Kadir Batcha Rowther.

Horwill, J.

possession of by the Official Receiver as part of the estate of her insolvent husband. The question that has been referred to us is whether the consequential relief of possession is to be valued according to S. 7 (*iv*) (*c*) of the Court-Fees Act or S. 7 (*v*).

There is a long line of authority for the position that where the consequential relief is such as to fall directly under some other section of the Court-Fees Act the suit has to be valued under that special section and not under the general head of consequential relief, which would make it fall under S. 7 (*iv*) (*c*). This principle was enunciated as long ago as *Chinnammal* v. *Madarsa Rowther*[1] by Boddam and Bashyam Aiyangar, JJ., and seems to have been accepted as axiomatic in the Full Bench case, *Arunachalam Chetty* v. *Rangaswamy Pillai*[2]. At the very outset of the judgment of the Bench it is laid down:

"A suit in which the plaintiff in terms prays for a declaratory decree and consequential relief *prima facie* comes within cl. 4, sub-clause (*c*) of S. 7 of the Court-Fees Act; but if at the same time it comes within any of the other classes of suits specified in the section, it must be treated as a suit of that description and dealt with accordingly".

This decision of the Full Bench case has been followed consistently in this Court. It is contended that this expression of opinion by the Full Bench was *obiter* but I have no doubt that it was a fully considered opinion in answer to the terms of the reference made to it; and even though it be *obiter*, I respectfully consider it to be a correct expression of the law which had been laid down in the earlier Madras cases and has been followed in a number of cases since. Venkatasubba Rao, J., in *Ramakrishnayya* v. *Seshamma*[3] refers to this opinion and adopts it, and it came before the same Judge again in *Maroof Sahib* v. *Ayyakannu Naicker*[4] where it was argued that as it was a consequential relief it should fall under S. 7 (*iv*) (*c*). That argument was repelled again by the weight of the authority just referred to. Since that decision the same principle has been upheld by Varadachariar, J., in *Sellammal* v. *Jothimani Nadar*[5] which was followed by Beasley, C.J., in C. R. P. No. 803 of 1935, where he says, that because the plaintiff asked for possession, it must come under S. 7 (*v*) and not under S. 7 (*iv*) (*c*).

1. (1903) 14 M.L.J. 343: I.L.R. 27 Mad. 480.
2. (1914) 28 M.L.J. 118: I.L.R. 38 Mad. 922 (F.B.).
3. (1934) 68 M.L.J. 369.
4. (1934) 68 M.L.J. 755: I.L.R. 58 Mad. 1051.
5. (1935) 70 M.L.J. 398.

Amina Bibi v. Kadir Batcha Rowther.

Horwill, J.

As against this current of authorities, four cases have been quoted. One is *Ramalinga Mudali* v. *Ramaswami Aiyar*[1] to which Venkatasubba Rao, J., was a party. He refers to this case in *Ramakrishnayya* v. *Seshamma*[2] and says that in the earlier case it was held that where there was a prayer for possession, if it was a consequential relief, it would fall under S. 7 (*iv*) (*c*), but that that suit was one relating to jurisdiction and the question whether it fell for the purpose of court-fee under S. 7 (*iv*) (*c*) or under S. 7 (*v*) was neither raised nor considered. Of the other cases, the earlier is *Koraga Gowda* v. *Somappa Gowda*[3] in which Pandalai, J., expressed the opinion that if possession was a consequential relief it fell under S. 7 (*iv*) (*c*); but the reason given by him for that decision was one which, with all due respect for the learned Judge's opinion, I cannot accept. He says that the suit was primarily one for possession and the declaration sought was only ancillary to the prayer for possession. This in my opinion seems to be an excellent reason for holding that the case comes under S. 7 (*v*) and not under S. 7 (*iv*) (*c*); and the learned Advocate for the petitioner concedes the position that if the main prayer is one for possession and the prayer for declaration is only ancillary to it, S. 7 (*v*) and not S. 7 (*iv*) (*c*) applies. In *Venkatalal* v. *Kosaldasu Bavaji*[4] the third case relied on by the petitioner, the question whether S. 7 (*v*) or S. 7 (*iv*) (*c*) applied was not decided. The plaintiff in that case appealed and the applicability of S. 7 (*v*) was not considered because it was clear that under S. 7 (*v*) he would have to pay a higher court-fee than he had already paid; and the only question that arose before that Court was whether the plaintiff would be permitted to pay a lesser court-fee than that leviable under S. 7 (*iv*) (*c*). The last case quoted on behalf of the petitioner is In re *Sobhanadri Rao*[5] to which my learned brother was a party. That case was rather a peculiar one in which an inamdar sought to oust a tenant from possession not so much because he wished to obtain possession but in order to assert his right to the kudivaram. In so far however as the learned Judges who decided that case applied a principle which seems in conflict with that applied by the Full Bench in *Arunachalam Chetty* v.

1. (1928) 29 L.W. 760.
2. (1934) 68 M.L.J. 369.
3. (1932) 36 L.W. 793.
4. (1930) 61 M.L.J. 39.
5. (1932) 63 M.L.J. 759: I.L.R. 56 Mad. 314.

Amina Bibi v. Kadir Batcha Rowther.

Horwill, J.

Rangaswamy Pillai[1], I am of opinion that the test applied in In re *Sobhanadri Rao*[2], is not correct.

In view of the fact that there is a very strong current of opinion in this Court and that the expressions of opinion to the contrary are not in my opinion of considerable importance, I have no doubt that the petitioner must pay court-fee under S. 7 (*v*) upon the total value of the property involved.

It has been argued that the Madras Amendment to S. 7 (*iv*) has altered the law as to the interpretation of the clauses of S. 7 (*iv*); but it seems to me clear that it was never intended by the legislature to alter the law as to the applicability of the sections of the Court-Fees Act, but merely to settle a lower limit to the amount of court-fee payable under certain circumstances which came within the mischief of S. 7 (*iv*) of the Act. This petition is therefore dismissed.

As regards costs, this petition is one between the plaintiff and the Government. The respondent is in no way interested in the result of the appeal. In fact, his interests, if any, are the same as the plaintiffs. I therefore dismiss the petition with the costs of the Government Pleader only. The respondent will bear his own costs.

Mockett, J.

Mockett, J.—I agree. An argument has been addressed to us that a different view of this topic has been taken by the other High Courts in India. Cases have been cited showing that that is so. I think it is much too late in the day in view of the trend of authorities in this Presidency to ask us to depart from the view taken in Madras.

The law governing the matter is clearly stated in the Full Bench decision in *Arunachalam Chetty* v. *Rangaswamy Pillai*[1]. As I was a party to the decision in In re *Sobhanadri Rao*[2], I think I should express something more than a bare agreement with what my learned brother has said. In that case it will be observed that there was neither the argument which has been so fully put before us now, nor even the reference to the Full Bench decisions. In the very special circumstances of that case we took the view that as the primary object of the suit was for a declaration, S. 7 (*iv*) (*c*) was applicable. But after hearing the present argument, it does appear to me that in view of the undoubted claim for possession which followed the decision

1. (1914) 28 M.L.J. 118: I.L.R. 38 Mad. 922 (F.B.).
2. (1932) 63 M.L.J. 759: I.L.R. 56 M. 314.

Amina Bibi v. Kadir Batcha Rowther.

Mockett, J.

in that case, In re *Sobhanadri Rao*[1] does not appear to be consistent with the view expressed in the Full Bench decision in *Arunachalam Chetty* v. *Rangaswamy Pillai*[2]. The case-law has been summarised by Venkatasubba Rao, J., in *Maroof Sahib* v. *Ayyakannu Naicker*[3] and I agree with the views expressed therein.

I agree that this Civil Revision Petition should be dismissed with costs of the Government Pleader.

B. V. V. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE MOCKETT AND MR. JUSTICE HORWILL.

The Public Prosecutor .. *Appellant**

v.

Bandi Pedda Venkata Nari .. *Respondent* (*1st Accused*).

Public Prosecutor v. Venkata Nari.

Penal Code (XLV of 1860), Ss. 300, 302 and 326—Quarrel between two persons—Accused entering house and returning with heavy rice pounder—Inflicting injury with rice pounder—Woman interfering on behalf of injured person—Single fatal blow dealt to woman—Death taking place after one week—Nature of offence—Death caused in rage and without long premeditation—Sentence.

The proper way in which the Court should decide whether an offence has or has not been committed under S. 300, Indian Penal Code, is to apply the words of the section to the facts and to see how the facts satisfy the essentials of the section. In such cases the nature of the material object used and the force used must be useful guides to the trial Court in arriving at a decision as to whether the intention and knowledge referred to in the section can be attributed to the accused.

The accused who lived opposite to the house of P. W. 1 was bathing in the street causing slush in the road. P. W. 1 protested and asked him to go and bathe in his backyard. The accused having insisted on bathing where he was, P. W. 1 caught hold of his water-pot and in the course of the scuffle the water-pot broke. Accused then went inside his house shouting abuse, brought out a heavy rice pounder and struck a blow with it on the head of P. W. 1 who fell down unconscious. Thereupon the deceased woman, who was the aunt of P. W. 1, ran up crying that her nephew was being killed, and then the accused struck her on the head with the rice pounder. She fell down unconscious and died a week thereafter. The injury was described as a fissured stillat fracture of the skull bone and the doctor stated that death was due to Meningitis resulting from the injuries received. The Sessions Judge convicted the accused for an offence under S. 326, Indian Penal Code and the Crown preferred an appeal.

Held, that the use of the heavy rice pounder by the accused on an unarmed woman constitutes "taking advantage" and "acting in a cruel and unusual manner" within the meaning of exception 4 of S. 300, Indian Penal

1. (1932) 63 M.L.J. 759: I.L.R. 56 Mad. 314.
2. (1914) 28 M.L.J. 118: I.L.R. 38 Mad. 922 (F.B.).
3. (1934) 68 M.L.J. 755: I.L.R. 58 Mad. 1051.

* Cr. Appeal No. 697 of 1936.   18th March, 1937.

Public Prosecutor *v.* Venkata Nari.

Code, and that death having resulted from the blow the accused was liable to be convicted under S. 302, Indian Penal Code.

Sentence of transportation for life passed in view of the offence having been committed in a rage and without any long premeditation.

Emperor v. *Sardar Khan,* (1916) I.L.R. 41 Bom. 27, and Unreported Judgments of the Madras High Court in R. T. No. 132 of 1930, C. A. No. 557 of 1930, R. T. No. 72 of 1931 and C. A. No. 263 of 1931, considered.

Appeal under S. 417, Criminal Procedure Code, 1898, against the acquittal of the aforesaid respondent (1st accused) under S. 302, Indian Penal Code, by the Sessions Judge of Cuddappah division in S. C. No. 30 of 1936 on his file.

A. Narasimha Aiyar for the Public Prosecutor.

C. R. Pattabhiraman for Respondent (engaged by the Court under R. 228 of the Criminal Rules of Practice).

The judgment of the Court was delivered by

Mockett, J.

Mockett, J.—This is an appeal by the Crown against the acquittal of the first accused of murder. He was in fact convicted of an offence under S. 326, Indian Penal Code, and sentenced to rigorous imprisonment for three years. On another charge in relation to an offence committed against another person (P. W. 1) he was convicted under S. 324, Indian Penal Code, and sentenced to rigorous imprisonment for one year, the sentences to run consecutively.

Now, with all respect to Mr. C. R. Pattabhiraman's arguments, we do not think there is any room for doubt with regard to the facts of this case which are simple enough. There is a wealth of evidence to establish them and we only propose to set out shortly what they amount to. The accused lives opposite to P. W. 1 as will be seen in the plan. Accused 1 was bathing in the street opposite to his house, thereby causing 'slush' in the road. P. W. 1 protested and asked him to go and bathe in his backyard. It seems to us a not unreasonable request. The accused said that he proposed to go on bathing where he was, whereupon P. W. 1 caught hold of his water-pot. So did accused 1 and in the process the pot broke. Accused then went to his house shouting abuse and brought out M. O. 1, a rice pounder which is two yards long and between 2" and 3" in diameter. We have compared it with one of the maces carried by the chobdars of this Court. It is about 6" longer and slightly thinner than the top of one of those maces. It is a very heavy piece of wood and would appear to require the use of two hands by an ordinary man. With this rice pounder, the accused struck P. W. 1 on the head, and P. W. 1 is not able to tell us very much more

Public Prosecutor *v.* Venkata Nari.

Mockett, J.

because he stated that he did not recover consciousness until about an hour later. P. W. 1 was fortunate. He had "A contused transverse wound 1 inch by $\frac{1}{4}$ inch skin deep, on right parietal eminence $4\frac{1}{2}$ inches above right ear" described in Ex. F as 'not of a serious nature. The next thing that happened was that the deceased woman, the aunt of P. W. 1 ran up crying out that her nephew was being killed, whereupon accused 1 struck her on the head also with M. O. 1. She fell down unconscious and bleeding and died on 6th May, 1936, this occurrence being on the 29th April. In her case, her skull was fractured. The fracture is described as follows in Ex. E:

"There is fissured stillat fracture of the frontal bone commencing from coronal section $1\frac{1}{2}$ inches to right of middle line, runs obliquely down to left orbital foramen passes through orbital plate ends at ethnoid bone. Measures $5\frac{1}{2}$ inches".

Then:

'From the middle of frontal part there was a fissured fracture transversely to the right $1\frac{1}{2}$ inches and then down to orbital ridge $1\frac{1}{2}$ inches and on the right orbital roof $1\frac{1}{2}$ inches and ends at ethnoid bone. There was a clot under the fracture, the membranes were congested, and the doctor states that she died of meningitis due to the injuries received. There was a slight depression of the brain under the clot'.

Now, the only question that can arise in this case—because, as we have already said, we are quite satisfied about the facts to which several witnesses have spoken is what offence has accused 1 committed? The learned Sessions Judge deals with that in paragraph 7 of his judgment. The following are some of the observations he makes in that paragraph:

"From the lie of the case according to the showing of the prosecution itself, it is manifestly clear that there was no intention on the part of the first accused to cause Yerikalamma's death."

Why such an absence of intention should be so manifestly clear is not wholly apparent. But it is to be observed that the Judge states that the public prosecutor "very fairly admitted this". The Judge goes on to say that it is not clear from the evidence that there was any deliberate aim at the head:

"It was not a premeditated act. It is a case of total absence of motive of any kind whatsoever. It was in a sudden fit of temper, infuriated by the sight of his broken pot, that the first accused in a momentary flash went into his house and came out with a rice pounder and dealt a blow with it".

One may pick up a rice pounder "in a momentary flash," but it is difficult to understand how one can so describe going into a house, picking up an object and bringing it out. A

Public Prosecutor *v.* Venkata Nari.

Mockett, J.

point was made that the rice pounder was not fetched by the accused for the purpose of striking the deceased. That appears to be true. He fetched it for the purpose of striking P.W. 1 and having struck P.W. 1, one might have expected that his temper would have abated. What did this woman do? All she did apparently was to object to her nephew being felled to the ground. For that she received a blow on her head which killed her. But says the learned Judge:

"The circumstances very clearly indicate to my mind both in respect of the intention and the knowledge on the part of the first accused nothing but an idea to chastise P.W. 1 and when Yerikalamma *eo instanti* intervened, in the same fit of temper, he chastised her also in order apparently to drive her away."

Such is the learned Judge's description of two blows from a weapon—because that is an accurate description of M.O. 1—which has only to be seen for one to appreciate that chastisement is a singularly inappropriate phrase to apply to any use of it. The Judge considers that:

"It is a fairly heavy weapon, which used as a weapon of offence, can surely cause death", and then surprisingly enough, after his observations about the chastisement, goes on to say, "it is undoubtedly a deadly weapon."

The learned Judge ultimately finds that:

"It would not be a violent inference from the circumstances of the case that the first accused must have been aware that the act would result in grievous injury to Yerikalamma".

The result of his conclusions is that he feels convinced that the facts proved established an offence under S. 326 so far as the attack upon Yerikalamma was concerned. We are wholly unable to agree with either the reasons or the conclusions above set out. Under S. 300, Indian Penal Code, it is, except in cases set out in that section, murder, if the act by which the death is caused is done with the intention of causing death; or (2) if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused; or (3) if it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or (4) if the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or

such injury as aforesaid. Now, it seems to us that when a man using great violence hits a woman, or indeed any one, with an object such as M.O. 1, it is unreasonable for the Court not to infer that he did so with the intention of causing death. But even if the Court is not prepared to draw that conclusion, can there be any doubt that the use of such a weapon must show an intention to cause such bodily injury as the offender knows. To be likely to cause death? If neither of these inferences appealed to the trial Court, it must surely be that that act was done with the intention of causing bodily injury to any person. With what intention was the blow on the head struck with such a weapon as M.O. 1? Can it possibly be less than with the intention of causing such bodily injury as ensued? If that is so, it is in evidence by the doctor that the external injury was by itself sufficient in the ordinary course of nature to lead to death. He says:

"As a matter of fact, it caused by itself death in this case, without any other supervening cause or factor".

That was a hard clot already found under the fracture pressing against the brain causing "depression" in the words of the doctor:

"This was what caused the inflammation of the membrane leading to meningitis. It should have formed immediately after the injury and should have caused unconsciousness".

We have therefore no doubt whatever on the evidence that the lower Court could have found that the intention of the accused was to cause the death of this woman. Alternatively, it must be that one or the other of the intentions set out in S. 300 are proved. In view of the nature of M.O. 1, which can properly and accurately be described as a "club", illustration (*c*) to S. 300 exactly applied if the trial Judge found as he did that the accused had no intention to cause death. Illustration (*c*) reads as follows:

"*A* intentionally gives *Z* a sword-cut or club-wound sufficient to cause the death of a man in the ordinary course of nature. *Z* dies in consequence. Here *A* is guilty of murder, although he may not have intended to cause *Z's* death".

It is sufficient for the purpose of our conclusion if we say that we find on the evidence that this case comes within S. 300, illustration (*c*). If that is so, the accused is *prima facie* guilty of murder. Can the case be brought within any of the exceptions to that section? No attempt has been made to do

Public Prosecutor *v.* Venkata Nari.
—
Mockett, J.

so. It is not necessary to set out those exceptions. It is enough to say that none of the circumstances in this case bring the accused within the benefit of any of them. The only one that could possibly be urged is exception 4, but there was no sudden fight with the deceased nor was there a sudden quarrel with her. All that happened was that she endeavoured to intervene between the accused and P.W. 1 and was struck down with M.O. 1, the use of which on an unarmed woman obviously constitutes "taking undue advantage" and "acting in a cruel or unusual manner".

Now, the case-law on this subject has been dealt with by the learned counsel who have argued this case, and our attention has been drawn to certain decisions. The first to be noticed is the decision of the Bombay High Court reported in *Emperor* v. *Sardar Khan*[1]. With regard to that decision, a careful perusal of the judgment shows that the learned Judges conceded that the Sessions Judge had followed what in a majority of cases had been held to be the right and logical course. He had inferred the intention from the extent of the injury and the nature of the weapon used which in that case was an iron-shod stick. The learned Judges then pointed out that juries are disposed to take a liberal and less logical view and to look at all the surrounding circumstances with the object if possible of reducing the offence. The learned Judges go on to say that they were disposed to take a more lenient view of the offence committed because death was caused by a single blow, and so it was more difficult to be absolutely certain what degree of bodily injury the offender intended. And they ultimately came to the conclusion that exceptional cases and circumstances warranted them, sitting as judges, in taking what might be a jury's view rather than a Judge's point of view. In the result the conviction for murder was altered to one for culpable homicide not amounting to murder. If the head-note of this decision correctly represents the finding of the learned Judges, it might well be said that this is a decision on the special facts of that case and lays down no general proposition of law. If it is intended, as it was cited before us, to establish the proposition that in the case of a single blow whatever the weapon, the accused should not be convicted of murder, then we must record our respectful dissent. We still

1. (1916) I.L.R. 41 Bom. 27.

however consider that that was a special decision with regard to the special facts. So far as this High Court is concerned, our attention has been drawn to a decision in R. T. No. 132 of 1930 and C.A. No. 557 of 1930 in which the Chief Justice and Sundaram Chettiar, J., held that to strike a man on the skull using considerable force is an act so imminently dangerous that it must in all probability cause death and constituted the offence of murder under S. 302. In the judgment occurs the following words:

"We are satisfied that the appellant struck this very severe blow on the head of the deceased and caused his death. He must be taken to have known that to strike a man on his skull with a stick using considerable force was an act so imminently dangerous that it must in all probability cause death and that he did so without any possible excuse. This therefore is the offence of murder and nothing short of it".

We respectfully agree with that decision. There is however another decision R. T. No. 72 of 1931 and C. A. No. 263 of 1931 in which Jackson and Cornish, JJ., held that in a case where a son hit his father with a crowbar on the head on small provocation, he had committed an offence under S. 324 and not the offence of murder. My learned brother Horwill and myself have already expressed our view about that decision in C. A. Nos. 590 and 591 of 1936. We there stated:

"We only desire to say a word about that case, because it has been referred to us as an authority. The learned Judges held that an accused person who hit the deceased on the head with a crowbar which fractured his skull did not commit an offence graver than the one under S. 324, Indian Penal Code. There might have been special circumstances in that case which induced the learned Judges to arrive at the decision which they did. We only desire to say that if as is suggested to us it is an authority for the proposition that a man who hits somebody else on the head with a crowbar causing death is guilty of nothing more than an offence under S. 324, then we must record our respectful dissent".

It seems to us that the proper way in which to decide whether an offence has or has not been committed under S. 300 read with S. 302 is to apply the words of the section to the facts and to see how the facts satisfy the essentials of the section. But it is obvious that the nature of the material object used and the force used must be useful guides to the trial Court in arriving at a decision as to whether the intention and knowledge referred to in S. 300, Indian Penal Code, can be attributed to the accused. With great respect to the learned Judges in the Bombay case to which we have referred, we think that it is a somewhat perilous course instead to call in aid the somewhat

Public Prosecutor *v.* Venkata Nari.

Mockett, J.

nebulous considerations which influence the conclusions of a jury.

The result of these conclusions is that this appeal will be allowed, and for the conviction under S. 326 there will instead be a conviction under S. 302. Many of the observations of the learned Sessions Judge are distinctly relevant on the question of sentence. This offence was committed without any long premeditation and certainly in a rage, and we do not consider that the capital sentence is called for. The accused will be sentenced to transportation for life. This sentence will run concurrently with the sentence of one year's rigorous imprisonment under S. 324, Indian Penal Code, already imposed on him.

B. V. V. — *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW.

Govinda Subbaramayya and another .. *Appellants** *(Accused)*

v.

The Emperor .. *Respondent.*

Govinda Subbaramayya *v.* Emperor.

Criminal Procedure Code, S. 164—Criminal Rules of Practice, r. 85—Confession—Recording of, by magistrate—Omission to warn as per r. 85—If invalidates confession—Raises a suspicion that it is not voluntary—Confession about disposal of dead body—Non-implication of confession in stages prior to death—If admissible against co accused on charge of murder—No grievous hurt in fact—Knowledge of likelihood of grievous hurt—If constitutes offence of grievous hurt.

Non-observance of the provisions of r. 85 (1) of the Criminal Rules of Practice is a serious defect and it necessarily has a bearing on the question of the admissibility, or at any rate, the value of the confession. Where a magistrate recording a confession omitted to warn the maker of the confession that "it is not intended to make him an approver" the question is not whether it invalidates the confession as being not one recorded in the manner prescribed by law, but whether the omission to give such a warning does not raise a strong suspicion that the confession was not voluntary but, as pleaded by the confessor, the result of an inducement held out to the effect that he would be taken on as an approver.

Where two persons are charged with murder, a confession, made by one of them, not in respect of the offence of murder, but about his taking part in the disposal of the dead body and without implicating himself in anything which preceded the death, could not be taken into consideration as against the other accused.

*Cr. Appeals Nos. 412 and 509 of 1936. 12th November, 1936.

Govinda Subbaramayya v. Emperor.

Mere knowledge that the kind of beating is likely to cause grievous hurt is not enough to constitute the offence of grievous hurt unless grievous hurt is in fact caused thereby.

Appeals against the order of the Court of Session of Nellore Division in Case No. 11 of the Calendar for 1936. (Judgment dated 13th July, 1936).

K. S. Jayarama Aiyar, G. Gopalaswamy and *C. K. Venkatanarasimhan* for Appellants.

K. Venkataraghavachari for *The Public Prosecutor* on behalf of the Crown.

The Court delivered the following

JUDGMENT.—This is an appeal from the judgment of the Sessions Judge of Nellore dated 13th July, 1936, in Sessions Case No. 11 of 1936 in which the two appellants were charged with murder but were convicted as follows:—First appellant under S. 326, Indian Penal Code, and the second appellant under S. 201, Indian Penal Code. The first appellant was sentenced to rigorous imprisonment for 10 years and the second appellant to rigorous imprisonment for three years. The charges relate to the killing of one Subbi described by the learned Judge as "a buxom wench of 22 years", who, though married and living with her husband, was said to have been kept by the first appellant Subbaramayya for some years prior to the occurrence. The learned Sessions Judge observes that the second appellant also was one of those to whom the deceased was distributing her favours but there does not seem to be sufficient evidence to support this view. It is, however, established that the second appellant and the first appellant are friends and used to move together. The dead body of Subbi was found in a well in the compound of the Board Elementary School, Kavali, sometime in the morning of 15th February, 1936. The peon of the school saw a bundle of cloths near the well and he reported the matter to the head-master P. W. 15, and as he suspected that there was something like a dead body in the well a report was sent by the head-master to the village munsiff, and the village munsiff who had been given information to the effect that the deceased was missing by the deceased's father, went to the school compound and got the dead body taken out of the well. The village munsiff does not appear at least to have sent for or informed the police, though

Govinda Subbaramayya v. Emperor.

the police station is in the same town, not only till after the dead body was taken out but even after he examined one of the witnesses who turns out to be the principal witness in the case, P. W. 7, who said that he had seen appellants 1 and 2 and the deceased near the well the previous night at about 9 P.M. The first appellant was arrested that very night in his house at Kavali. The second appellant is said to have left Kavali the next morning by train and he was ultimately arrested on the 18th at Sitaramapuram where he was staying with a relation of his. He was produced before the Stationary Sub-Magistrate of Kavali on the 19th. It is said that because later on the second appellant expressed a desire to the police to make a confessional statement the Sub-Magistrate of Kavali who was not empowered to record confessions forwarded him on 1st March, 1936, to the Stationary Sub-Magistrate of Kovvur who was so empowered. The Sub-Magistrate, P.W. 8, kept the second appellant in a separate cell in the sub-jail and after giving him two days' time for reflection recorded a confession from him on 3rd March, 1936.

The case for the prosecution is that the two appellants and the deceased went together to the school compound in question some time in the evening of the 14th of February between 8 and 9 P.M., and were seen talking there. The evidence relating to the previous movements of the deceased and of the appellants is not of very great importance except perhaps that portion of it which relates to the conversation that took place between the deceased and one Polugadu, P.W. 9, a cousin of hers, which was heard or seen by the first appellant. It is necessary to refer to this because the learned Sessions Judge appears to have thought that this conversation, trivial as it was, was the real cause of the tragedy as it led the first appellant to suspect that Polugadu was one of the newly found lovers of the deceased, and that it was because jealousy was so aroused that he dogged the steps of the deceased and finally induced her to go with him and the other appellant to the school compound. The evidence of P.W. 7 is to the effect that he saw the two appellants and the deceased near the well talking at about 9 P.M. What happened thereafter he does not know. As to what happened in the school compound afterwards there is only the confession of the second appellant; and it is on this that the prosecution rests mainly. It is conceded

Govinda Subbaramayya v. Emperor.

by the Public Prosecutor that if that confession goes it must follow that the prosecution has failed to establish the guilt of either of the appellants. Before dealing with this confession it may be desirable to mention that the case for the prosecution as shown in the confession is that the deceased was beaten with a stick by the first appellant, the stick itself being that of the second appellant. The injuries caused were not very serious so far as appearances go. The medical evidence does not show that there was any serious internal injury, and the principal external injuries were, a small incised wound on the centre of the head, a contusion below the right breast, and an irregular contusion on the left side on the abdomen besides a contused swelling on the left side of the neck. According to the Sub-Assistant Surgeon all these injuries besides the minor injuries noted by him might have been caused by a blunt instrument. The cause of death is no doubt given by him as shock due to the injuries, but the nature of the injuries, does not seem to support fully this conclusion. Unfortunately, the Sub-Assistant Surgeon was not cross-examined as to the cause of death, and in this state of the evidence, however unsatisfactory the position may be, it is difficult to say that the medical opinion as to the cause of death is wrong though if the point was very material and had to be decided I should say that the cause of death has not been satisfactorily established. It is, however, unnecessary to go into the question of the cause of death because neither of the appellants had been found guilty either of murder or of culpable homicide. The offence of which the first appellant has been convicted is one of causing grievous hurt with a dangerous weapon and the offence of which the second appellant has been convicted is one punishable under S. 201, Indian Penal Code. It may, however, be mentioned that it is very difficult to understand the reasoning of the learned Sessions Judge which led him to think that the stick said to have been employed in inflicting the injuries on the deceased was a weapon of the kind mentioned in S. 326, Indian Penal Code, that is to say, an instrument for shooting, stabbing or cutting or an instrument which used as a weapon of offence, is likely to cause death. There is nothing in the evidence so far as I can see to show what the size of the stick was or its weight or its length; the evidence refers to it merely as a stick. It cannot certainly be said that every stick is an instrument of the kind described in S. 326, Indian Penal

Govinda Subbaramayya v. Emperor.

Code. Finally, the learned Sessions Judge does not clearly explain why he was of opinion that grievous hurt had been caused in this case. The nature of the injuries themselves does not show that they constitute grievous hurt. His view appears to have been that:

> "the offence committed by the first accused would fall under S. 326, Indian Penal Code, because the accused would have known full well that beating a person on the tender parts of the body forcibly with a stick would cause grievous hurt".

In other words, he seems to have been of opinion that beating a person with the knowledge that such beating would cause grievous hurt would amount to the offence of causing grievous hurt. This is not correct because unless grievous hurt is actually caused the offence of causing grievous hurt is not established. Mere knowledge that grievous hurt is likely to be caused is not enough if grievous hurt is not actually caused. There is no finding by the learned Sessions Judge in this case that grievous hurt had been actually caused to the deceased.

I turn now to the all-important question of the admissibility of, and the weight to be given to, the confession made by the second appellant, namely, Ex. B series. In the first place that confession was retracted at the very first opportunity, that is to say, during the preliminary enquiry before the Committing Magistrate, by the second appellant. His case was that he made that confession under the hope held out to him by the police that he would be taken on as approver; in fact, he mentioned the particular head constable who held out such a hope. It is not as if we have only a vague statement that the confession was induced by the police. The specific allegation made by the second appellant is to some extent supported by the fact that only three days later, that is to say, on the 6th March, the Sub-Inspector of Police, *i.e.*, the officer investigating the case, told the Magistrate who recorded the confession that the question of taking the second appellant as an approver was under correspondence. It would therefore appear as if there was some idea in the mind of the Police Officer investigating the case of taking the second appellant as an approver. Whether the idea arose for the first time only after the confession was recorded or even before is difficult to say. It is a remarkable coincidence that the Magistrate who recorded the confession, while he with meticulous care put a number of other questions to the second

appellant before recording his confession in the very words contained in the rule (Rule 85 of the Rules of Practice) did not give him any warning as required by that rule that it was not intended to take the second appellant as an approver. Indeed, this is one of the imperative directions contained in r. 85 of the Criminal Rules of Practice the first part of which runs as follows:—

"No Magistrate shall record any statement or confession made by an accused person under S. 164 of the Code of Criminal Procedure (1) until the Magistrate has first recorded in writing his reasons for believing that the accused is prepared to make the statement voluntarily and (2) until he has explained to the accused that he is under no obligation to answer any question at all and he has warned the accused that it is not intended to make him an approver and that anything he says may be used against him".

In the second part of r. 85 certain questions are suggested as questions which may be usefully put by the Magistrate to the accused for the purpose of satisfying himself that the confession is voluntary. All these questions were put in the very words found in the rule by the Magistrate in this case. At the end of the confession and as a part of the certificate of the Magistrate it is stated that it had been explained by the Magistrate to the second appellant that he was not bound to make a confession and that if he did so any confession which he might make might be used against him. It would have been far more satisfactory, if this had been done before the confession was recorded than at the end. If the explanation that the accused was not bound to make a confession and that any confession which he may make may be used against him had been given only after the confession was recorded it would not help in deciding whether the confession was voluntary. The certificate itself does not say that this explanation was given to the appellant before the confession was made. The Magistrate who was examined about the confession says that he did not warn the second appellant that it was not intended to take him as an approver. This was in his cross-examination. The prosecution has not elicited the reason why he did not give this warning whether the omission was deliberate or accidental. Nor did the Court whose duty it was to satisfy itself that the confession had not been brought about as a result of any inducement held out that the precaution of ascertaining why the Magistrate did not give the warning. The importance of this warning cannot be under-rated. It may be that the rule prescribing such warnings to be given, namely, r. 85 of the

Govinda Subbaramayya v. Emperor.

Criminal Rules of Practice is only a rule of practice and not a rule having the force of law. But that does not conclude the matter. It is a rule which has been in existence for nearly fifty years past. The rule was made as the result of a representation made by the High Court as will be seen from G. O. No. 2883, Judicial, dated 17th December, 1887, a reference to which appears to be not out of place. The High Court had called the attention of the Government to the increasing number of cases in which there was reason to believe that:

> " Accused persons have been subjected by the police to ill-treatment or torture in order to extort a confession or that confessions possibly so obtained have been too hastily admitted or relied on by the Criminal Courts ".

The Governor-in-Council recognised the great importance of the subject and expressed his fears that the representation of the High Court was not exaggerated. It was also observed that the commonest course employed by the Police

> " Is to accompany a threat or a moderate degree of ill-treatment with a promise or hint that on confession the accused shall be made an approver ".

One of the suggestions made by the High Court and approved by the Government was that village munsiffs should be absolutely prohibited from taking the signature of an accused person to any confession or statement whatever, or even reducing such statement to writing. The second suggestion was, and it was also accepted by the Government, that:

> " No Magistrate should record any confession or statement under S. 164 of the Criminal Procedure Code until he has first recorded in writing his reasons for believing that the accused is going to make such statement voluntarily and until he has explained to the accused that he is under no obligation to answer any question at all, and warned him that it is not intended to make him an approver, and that anything he says will be used against him ".

These are the very words of r. 85 (1) of the Criminal Rules of Practice as it stands now. No doubt this rule was issued as an executive order to all Magistrates. But the rule is one which is so obviously a rule of justice and reason that its non-observance must be regarded as a serious defect and must necessarily have a bearing on the question of the admissibility, or at any rate, the value of the confession. This is so all the more in cases like this where practically the case for the prosecution rests on a confession obtained without observing the precautions which have been prescribed as necessary and

Govinda Subba-ramayya *v.* Emperor.

observed as such as a general rule of practice for nearly 50 years; the question is, not whether the omission to give this warning invalidates the confession as being one not recorded in the manner prescribed by law, but whether the omission to give such a warning does not raise a strong suspicion that the confession was not voluntary, a suspicion so strong that when taken in connexion with other circumstances it would amount to a fairly strong probability that the confession was the result of an inducement held out to the effect that the accused would be taken as an approver.

The learned Sessions Judge seems to have thought that this retracted confession could be taken into consideration even as against the first appellant forgetful of the fact that this was not a case in which the confession of the second appellant was in respect of the offence of which both of them were charged, namely, the offence of murder. The confession is only a confession about taking part in the disposal of the dead body so far as the maker of the confession is concerned. It does not implicate the maker of the confession in anything which preceded the death. It is enough in this connexion to refer to the observations of Reilly, J., in *Periaswamy Moopan and another*, In re[1]. This is therefore a case in which the confession even if unretracted could not be taken into consideration as against the first appellant; and the learned Sessions Judge has erred in law in not only taking into consideration against the first appellant but in actually basing his finding about the guilt of the first appellant on such a confession. It is astonishing to find, in view of the actual confession made by the second appellant the learned Sessions Judge saying:

> " This is not a case where the second accused wants the hangmen's rope to be wound round the neck of the co-accused and assigned to himself a minor part ".

In fact this is indeed a case of this kind, for while assigning the cause of death to the first appellant the maker of the confession assigns to himself the comparatively minor part of assisting the person who killed the women and disposing of the dead body. In view of the opinion that I have formed about the nature of this confession it is not necessary to deal with the other aspects of the case for instance the absence of any motive as regards both the appellants. It may be that some feeling of jealousy might have been aroused but the

1. (1930) 59 M.L.J. 471: I.L.R. 54 Mad. 75.

Govinda Subbaramayya v. Emperor.

subsequent conduct in going together to the school compound after first appellant had given a few blows with the second appellant's stick to the deceased, and, according to the learned Sessions Judge's view, the first appellant and the deceased thereafter having intercourse just prior to the meeting appear to show to an unprejudiced mind that the temporary feeling of jealousy must have ceased to oppress the first appellant's mind. The learned Sessions Judge was of opinion that they went to the school compound after "composing their differences for the time being", and they were chatting together there. The learned Sessions Judge moreover expresses a doubt as to whether the first appellant "ever intended to give anything more than a good hammering to his concubine for her suspected unfaithfulness."

As I have found already, the confession on which the finding of the learned Sessions Judge rests almost entirely in the sense that without it the finding cannot stand was in all probability made because of some inducement held out by the Police Officers in charge of the case that the maker of the confession would be taken on as an approver. Even as against the maker of the confession it is not admissible and it must certainly be disregarded entirely as regards the first appellant. Whereas in the case the prosecution seeks to rely almost entirely on a confession, it is all the more necessary that every precaution must have been to ensure that the procedure prescribed by r. 85 of the Criminal Rules of Practice is observed not merely in the letter but in the spirit. I am of opinion that in this case this rule has not been observed either in the letter or in the spirit.

The convictions and sentences of both the appellants are therefore set aside, and they are acquitted under S. 423, Criminal Procedure Code. Their bail bonds will be cancelled.

S. V. V. ——— *Accused acquitted.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW.

Alla Satyam *alias* Satyanarayana Rao and another .. *Petitioners** (*Accused*)

v.

The Emperor .. *Respondent.*

Alla Satyam *v.* Emperor.

Criminal appeals—Jurisdiction of Sessions Judge to decide whether cases ought to have been decided by the Government Agent or otherwise—Agency tracts.

Some criminal cases were tried by the Sub-Divisional Magistrate of Peddapuram and the accused who were convicted appealed from their convictions and sentences to the Sessions Judge of East Godaveri. But before the Sessions Judge, the Public Prosecutor raised a preliminary objection that the Sessions Judge of East Godaveri had no jurisdiction to entertain the appeals and that the appellate authority was the Court of Sessions for the Agency District of East Godaveri, that is, the Government Agent. A report was called by the Sessions Judge from the Sub-Divisional Magistrate. The Sessions Judge felt that the question whether he had jurisdiction or not was practically to be decided by the very Magistrate from whose judgments appeals were taken.

Held, that the Sessions Judge had not only the right to decide the question of jurisdiction himself but it was his duty also to decide it himself and he was wrong in thinking he had no option but to accept the report without question of the Sub-Divisional Magistrate even where the report spoke differently.

Petitions under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of Session of East Godaveri Division at Rajahmundry in C. As. Nos. 16 and 17 of 1936 (C. C. Nos. 68 and 69 of 1935 on the file of the Court of the Sub-Divisional Magistrate of Peddapuram).

K. S. Jayarama Aiyar and *G. Gopalaswamy* for Petitioners.

The Public Prosecutor on behalf of the Crown.

The Court made the following

ORDER.—These cases arise out of the sinking of a motor launch in the rapids of the Godaveri near Manturu Village on the 21st July, 1935, which resulted in the loss of six lives and property worth about Rs. 3,000. The clerk in charge of the launch and two others who have been discharged as well as the owner of the launch were charged by the police before

---

* Crl. R. C. Nos. 309 and 310 of 1936. (Crl. R. P. Nos. 285 and 286 of 1936). 1st September, 1936.

Alla Satyam *v.* Emperor.

the Joint Magistrate of Rajahmundry. The cases were transferred by the District Magistrate of East Godaveri to the Sub-Divisional Magistrate of Peddapur for disposal apparently because the Joint Magistrate of Rajahmundry had made an investigation of the occurrence. The clerk as well as the owner were convicted by the Sub-Divisional Magistrate of Peddapur in C. C. Nos. 68 and 69 of 1935 and both of them appealed from their convictions and sentences to the Sessions Judge of East Godaveri. Before the Sessions Judge a preliminary objection was raised by the Public Prosecutor of East Godaveri to the effect that the Sessions Judge of East Godaveri had no jurisdiction to entertain the appeals and that the appellate authority was the Court of Sessions for the Agency District of East Godaveri, that is to say, the Government Agent of East Godaveri. Throughout in these proceedings there was no mention made of any of the Magistrate before whom the case was pending that they were acting in the capacity of Agency Officers or Agency Magistrates and not as Sub-Divisional Magistrates administering criminal justice in the plains. The cases were also transferred not by the Government Agent but by the District Magistrate of East Godaveri. The transfer was made to the Sub-Divisional Magistrate of Peddapur and not to the Assistant Agent of Peddapur. In one of the cases the alleged offence took place at Rajahmundry itself and of that offence only the Magistrate in the plains could take cognisance. It is not alleged that it is open to the District Magistrate as such to transfer a case from the plains to an Agency Court or *vice versa.* Though it is the same officer who exercises jurisdiction in the two capacities of District Magistrate and Government Agent the capacities are quite different not only as regards the territorial limits within which the authority is to be exercised but in other respects as well. There is nothing in the record to show that these cases were dealt with at any time either by the Government Agent as such or by any Agency Magistrate as such. The judgments that were appealed from purport to be judgment of the Sub-Divisional Magistrate of Peddapur and not of the Agency Magistrate. When the record was so clear and unambiguous it is difficult to understand on what grounds the Public Prosecutor of East Godaveri raised the preliminary objection on the score of want of jurisdiction in the Sessions Court of East Godaveri or why the learned Sessions Judge before whom such an

Alla Satyam *v.* Emperor.

objection was made thought it fit to call for a report on the subject from the Sub-Divisional Magistrate from whose judgments the appeals were preferred. Any report made by a Magistrate after pronouncing judgment cannot be used to contradict or vary what is contained in the judgments themselves. Apparently the Sub-Divisional Magistrate was asked to report in what capacity he tried the cases. Instead of giving a categorical answer the learned Magistrate made a report which reads like a special plea in support of the objection to jurisdiction raised by the Public Prosecutor. Some of the statements of fact in the report are not borne out by the record. For instance it is stated in the report:

"The cases were transferred to the Assistant Agent, Peddapuram. The order of transfer does not support this statement, for the transfer is made by the order to the Sub-Divisional Magistrate, Peddapur and not to the Assistant Agent".

The report then goes on to state that there was some mistake:

"But owing to a mistake the various officers described themselves as Sub-Divisional Magistrates and District Magistrate".

Whether there was such a mistake or not it was certainly not open to the Sub-Divisional Magistrate to state that there was a mistake in description even by the District Magistrate. It might have been open to him to confess his own mistake, but I do not think he was entitled to attribute a mistake, which in all probability has no foundation in fact, to the District Magistrate. Then follows the expression of opinion to the effect that the mistake of description does not affect the validity of the trial because the Sub-Divisional Magistrate, Peddapuram, is also an Assistant Agent. The report then goes on to deal with the practice in the Courts according to which the parties select the appellate Court accordingly as the place of offence is in the agency or plains. Finally the Sub-Divisional Magistrate stated in his report that he had no need to particularly notice the fact that he was describing himself as Sub-Divisional Magistrate and that this point was not brought to his notice or to the notice of his predecessor by any one and concluded with the observation that so long as the offence took place in the agency and he was an Assistant Agent, the appeal lay to the Governor's Agent at Cocanada, forgetting at the same time to take notice of the fact that in one of the two cases the occurrence took place at Rajahmundry itself which is admittedly not in the Agency. The calling for a report was

Alla Satyam v. Emperor.

iiself unnecessary, and, as the sequel shows, undesirable. The view that the learned Sessions Judge took of the report was even more questionable. The learned Sessions Judge says:

> "I have no option but to accept the report of the Sub-Divisional Magistrate of Peddapur as correct and held that the cases were tried by him in his capacity as Assistant Agent, Peddapur".

In other words the learned Sessions Judge thought that the question whether he had jurisdiction or not to entertain the appeals was practically to be decided not by himself, but by the very Magistrate from whose judgments the appeals were preferred, a proposition which has only to be stated to be rejected. The learned Sessions Judge had not only the right to decide the question of jurisdiction himself, but it was his duty also to decide it himself and he was certainly wrong in thinking that he had no option but to accept without question the report of the Sub-Divisional Magistrate even where the record spoke differently. There has been in this case no real attempt by the learned Sessions Judge to apply his own mind to the question of jurisdiction which was raised before him, and what has happened is in effect a decision of that question by the Magistrate from whose judgments the appeals were preferred. The learned Public Prosecutor who appears in this Court is unable to state what useful purpose was intended to be served by raising the preliminary objection to jurisdiction in these cases. Even if there was any useful purpose behind the objection put before the Sessions Judge, I have no doubt that the objection is without foundation so far as these cases are concerned. These cases were throughout dealt with by the Sub-Divisional Magistrate as such and not as Assistant Agent as is now sought to be made out. The fact that the Sub-Divisional Magistrate is also an Assistant Agent does not affect the question because in cases decided by him in his capacity as Sub-Divisional Magistrate appeals would admittedly lie only to the Sessions Judge of East Godaveri. It is strange to find that in spite of what was said in the case reported in 23 M.L.J. 670, the Magistrate who exercised authority both as Sub-Divisional Magistrate in the plains and as Assistant Agent in the Agency tract did not take the trouble to bear in mind in these cases the particular capacity in which he was acting and to indicate the same in his proceedings. Any laxity in this respect is not to be encouraged, and it would be a definite encouragement if the Magistrate is permitted to rectify the omission later on by

Alla Satyam *v.* Emperor.

making a special report after the cases had been disposed of by him. The order of the learned Sessions Judge declining jurisdiction is wrong because he had jurisdiction to hear the appeals in these cases. His order returning the memoranda of appeal for presentation to the proper court is set aside and he is directed to get back the memoranda of appeal from the appellants or from the court in which they were filed and dispose of them according to law.

K. C. *Petition allowed.*

[END OF VOL. I.]

GENERAL INDEX.

VOLUME I.

PAGE.

Adverse Possession—If interrupted by claim order—O. 21, R. 58, C. P. Code .. 642

Agency tract—Criminal Appeals .. 759

Agreement—Suit by plaintiff for recovery of money—Commissioner appointed to settle accounts between defendants—Agreement by the defendants to abide by any finding of Commissioner regarding payment of money—Finding that money was due to second defendant by first defendant—Attempt to resile from agreement—Enforceability of agreement—Decree how to be passed .. 672

Appeal—Appellate Court—Duty of (P.C.) .. 538

Board of Revenue—Madras Estates Land Act, S. 30 (*i*) (*b*)—Limit of enhancement imposed by—Applicability to settlement of rent under Chapter XI. Suppl. 1

————Madras Estates Land Act, S. 168 (2)—Construction—"Shall have regard to"—Settlement of rent under Chapter XI—Rise in prices—Enhancement of rent due to—Principles applicable. Suppl. 1

Bombay Revenue Jurisdiction Act (X of 1876), S. 4—Applicability (P.C.) .. 367

Certiorari—Writ of .. 37

————Writ of—Orders of the Board of Religious Endowments in exercise of powers vested by S. 18 of the Act (II of 1927) as amended—Petitioners—One, a member of a temple committee and another an aspirant to the office of trustee of a temple—Administrative orders not affecting prejudicially the petitioners—No reason for writ issuing—No *locus standi* for petitioners to complain .. 442

Ceylon Evidence Ordinance (XIV of 1895), S. 32—'Verbal statement' (P.C.) .. 600

PAGE.

Charge—If created in the circumstances of the case .. 50

Child Marriage Restraint Act (XIX of 1929), Ss. 5 and 6—Marriage celebrated at Frenchpet—Conviction for offence of child marriage—*Bona fide* doubt as to Frenchpet being French territory—Whether can be pleaded as defence—Act as having extra territorial effect .. 388

————**S. 8**—Whether Additional District Magistrate has jurisdiction to try cases arising under the Act .. 498

Chit Fund—Nature of transaction and liability .. 163

Civil Procedure Code, S. 11—Construction *res judicata* in execution proceedings—Conditions for application of .. 296

————**S. 11**—Execution proceedings—Uncertified payment—Assignment of decree—Execution petition in between and subsequently—No mention of payment by judgment-debtor—Plea that the payment has not been given credit to—When *res judicata* .. 296

————**S. 11**—Father's suit against son's creditor and son—Father disputing the attachment by creditors of son of suit property on the ground of the property being his self-acquisition—Previous suit by father against son and others for declaration of suit property as his self-acquisition—Judgment in favour of father—Father seeking to raise a plea in the present suit of *res judicata*—Son's creditor not a party to the earlier suit by the father—Creditor claiming under rights of the son—*Res judicata* even though creditor of son was no party to the previous suit. 575

————**S. 11**—Landlord and tenant—Suit for rent—Decision regarding nature of holding—Effect in suit relating to subsequent years—Erroneous decision of question of law—Whether operates as *res judicata* (F.B.) .. 233

PAGE.

Civil Procedure Code, S. 11, Expl. VI—Representative suit regarding temples—Negligence in conduct of litigation—Omission to produce documents and place available evidence before Court—Subsequent suit regarding same subject-matter—Proof of fraud and collusion —Bar of *res judicata* (P.C.) .. 113

————**S. 60**—Effect of, on creditor's right .. 249

————**S. 73**—Decree against father—Decree against father and sons—If against same judgment-debtor—No investigation as to binding nature of debt in decree against father .. 180

————**Ss. 144 and 151**—Pauper suit —Defendants directed to pay Court-fee to Government—Appeal—Reversal of order—Application for restitution—Award of interest on Court-fee paid —Discretion of Court .. 21

————**S. 153**—Word 'proceeding' meaning of—Execution—Sale of properties of judgment-debtor—Mortgagee of properties applying for challan to be issued—Issue of challan and deposit in Taluq treasury of decree amount —Prayer for adopting it as an application under O. 21, R. 89, Civil Procedure Code, for setting aside sale—Whether proper .. 658

————**O. 1, R. 4** .. 41

————**O. 1, R. 10**—Claim to a vacant site against municipality—Municipality stating that ownership of the suit property was in Government as it was originally a highway—Whether Government to be made a party to the suit .. 597

————**O. 1, R. 10**—Transposition of second defendant as second plaintiff—If proper under the circumstances .. 672

————**O. 7, R. 11 (F.B.)** .. 1

————**O. 9, R. 13**—Minor—Guardian *ex parte*—Delaying tactics—If mere absence sufficient cause .. 36

————**O. 21, R. 2 and R. 16**—Uncertified payment—Assignment of decree—Assignment deed accepting the payment—Deed filed in Court in O. 21, R. 16 petition—If assignee can ignore the payment—Formal certification or request to record satisfaction not necessary—Sufficient if decree-holder admits payment before executing Court .. 296

————**O. 21, Rr. 18 and 20**—Principles governing set-off decrees—Mortgage and money decrees—Whether can be set off as against each other—Personal liability of mortgagor, whether condition precedent—Decree in favour of several persons—Set-off in respect of decree against one—Consent by other parties—Effect (P.C.) .. 254

PAGE.

Civil Procedure Code, O. 21, R. 58—Claim petition against an attachment—Dismissal of—Failure to file suit under O. 21, R. 63 —Attachment raised subsequently but more than a year after the rejection of claim—Claimant continuing in possession—Claimant found to be in possession from before claim petition—Adverse possession if interrupted by the claim order—Subsequent possession for over 12 years—If necessary to prove fresh entry into possession or 12 years' possession from after date of the raising of attachment .. 642

————**O. 21, Rr. 58 to 63**—Claim under R. 58 by a third party—Disallowance of claim—Suit under R. 63 by defeated claimant—Proof that attachment was invalid by reason of debtor's insolvency—If enough to decree the suit—Question of title must be gone into .. 133

————**O. 21, R. 63**—Construction—'Establish the right to' .. 133

————**O. 21, R. 89.** *See* C. P. Code, S. 153 .. 658

————**O. 21, R. 89**—Court auction of properties belonging to judgment-debtor—Purchase and deposit of money into Court by the purchasers—Confirmation of sale pending—Private sale of some of the auctioned plots by the judgment-debtor to the same purchasers—Application by judgment-debtor praying to appropriate amount deposited to decree and set aside Court sale under O. 21, R. 89—Whether can be allowed in the circumstances. 264

————**O. 21, R. 89 and O. 34, R. 5** —Sale of mortgaged property—Applications under O. 21, R. 89 to set aside sale as well as under O. 34, R. 5—Court holding that as the application was filed after 32 days it was out of time—Confirmation of sale by order was the criterion and not mere lapse of thirty days—Application filed before order specifying confirmation of sale was within time .. 569

————**O. 21, Rr. 95, 101 and 103**—Application for removal of obstruction to possession—Dismissal of, as question of title pending determination —Determination of title in the other suit—Decision within one year of order on possession petition—No suit filed under O. 21, R. 103—Later petition for possession—If maintainable—Later petition to be treated as one for revival of earlier petition .. 667

————**O. 21, Rr. 97, 98 and 103**—Plaintiff purchaser of defendant's

PAGE.

brother's half share in suit properties in pursuance of his execution against defendant's deceased brother—Resistance to delivery—Order of Court recognising plaintiff's petition and refusal to accept defendant's plea of his purchase of that share from his brother's widow—Suit by plaintiff for recovery of possession of the half share—Whether defendant precluded from re-agitating same pleas and how far .. 122

Civil Procedure Code, O. 22, R. 9—Suit by benamidar—Benamidar's death before decree—No legal representatives added—Abatement of suit—Subsequent suit by real owner—If competent .. 33

———**O. 32, R. 7**—Applicability and scope—Court guardian not prevented from entering into a compromise or arrangement on behalf of a minor defendant .. 384

———**O. 33, R. 1, Explanation**—Suit *in forma pauperis* by Official Receiver—Whether his possession of sufficient means in his personal capacity could prevent his suing as a pauper (F.B.) .. 727

———**O. 33, Rr. 5 and 9**—Leave to appeal *in forma pauperis*—Transfer of interest in subject-matter of suit by the applicant to another—Transfer even earlier than lower Court's decision against him—Whether leave was properly refused .. 147

———**O. 33, R. 9 (c)**—Suit on mortgage as pauper—Plaintiff claiming the full amount himself—Sixth defendant claiming half of it as joint payee—Agreement between them accepting sixth defendant's title—If an agreement falling under O. 33, R. 9 (*c*) .. 616

———**O. 33, Rr. 11 and 12**—Pauper suit by minor represented by next friend—Disposal by Court—Order directing next friend to pay costs of suit—Application by Government to direct plaintiff to pay court-fee—Maintainability .. 151

———**O. 34, R. 14**—Surety for the amount under a mortgage—Plaint giving up the mortgage and claiming money on simple money bond—Whether surety discharged under the circumstances .. 469

———**O. 40, R. 1**—Receiver whether could be appointed in a declaratory suit—Test is whether property is in dispute between parties—Whether when suit was pending in appeal to the High Court, a general Receiver could be appointed by the trial Court—Circumstances when Receiver could be appointed and by whom .. 605

PAGE.

Civil Procedure Code, O. 41, R. 19—Dismissal for default—Counsel engaged in another Court—Application to restore—Consideration in dealing with such an application .. 632

Civil Service Classification Rules, R. 14. *See* Government of India Act (1919), S. 96-B (P.C.) .. 529

Company—Memorandum of Association—Among objects mentioned that 30 per cent. of the subscription to go to specified charity—Whether in the absence of a definite amount as subject-matter of the trust being mentioned, requisites of valid trust existing—Terms of donation certificate issued creating trust .. 10

Companies Act, S. 104—Statement in Form VII filed before Registrar under—If amounts to a conveyance or an agreement (F.B.) 108

———**S. 185**—Liquidation of company—Claim by liquidator of moneys against former agent—Counter by agent of his right to retain some amounts as well as non-liability for others—Whether S. 185 was applicable—Agent ceasing to be an agent at the time of claim if would preclude Court from taking action under S. 185—Directions proper to be made .. 219

———Form VII (F.B.) .. 108

Contract—Binding character—Zamindar promising to pay Taluq Board annual subscription for maintenance of a Hospital, provided one was established within his Zamindari—Establishment of Hospital accordingly—Payment of annual subscription stopped by successor of Zamindar—Contract whether in its nature a continuing offer .. 50

———Construction—Whether binds successors .. 50

Contract Act (IX of 1872), S. 16—Undue influence—Burden of proof (P.C.) .. 719

———**S. 23**—Civil liability and a criminal offence—Prosecution launched—Offence one compoundable only with permission of the Criminal Court—Permission to compound not obtained—Agreement to pay a sum in settlement of civil liability—The withdrawal of prosecution part of the bargain—If agreement enforceable at law .. 489

———**Ss. 23 and 24**—Deed if embodies an unlawful agreement (P.C.) .. 166

———**S. 70**—Remuneration for services rendered (P.C.) .. 719

PAGE.

Contract Act (IX of 1872), S. 141—Discharge of surety—Plaint giving up rights under mortgage—Duty of Court .. 469

————**S. 217** .. 219

Co-operative Society—Honorarium—Secretary of a Building Society claiming a share of the net profits under a by-law of the Society—By-laws of the Society—Circumstances under which he would be prevented from claiming it .. 511

Co-operative Societies Act (II of 1912), S. 42 (b)—Order of liquidator under—If decree for money .. 640

Co-owner—Possession by one—Liability for rent or mesne profits to the rest .. 501

Court-fees—What constitutes—Suit for dissolution of partnership and accounts—Partnership found and case referred to Official Referee for taking of accounts—Appeal against judgment under Cl. 15 of the Letters Patent—Court-fee payable .. 346

Court-Fees Act (VII of 1870 as amended in Madras), S. 7 (iv) (c) and (v)—Scope—Suit falling under special section of Act—Cl. (4) (*c*) of S. 7 as being inapplicable—Suit for declaration as to ownership and for possession—Prayer for possession as main relief—Court-fee payable .. 739

————**S. 7 (iv-A) and Sch. II, Art. 17-A**—Decree for money—Order of liquidator under S. 42 (*b*) of the Co-operative Societies Act (II of 1912)—Suit to declare order to be null and void—Court-fee payable—Provisions of Court-Fees Act—Construction in favour of subject .. 640

————**S. 7 (v) and Sch. II, Art. 17-B**—Mahomedan co-sharers—Claim for possession of share in alienated as well as unalienated properties—Proper court-fees .. 572

————**S. 12 (i) and (ii)**—Judge first holding court-fee paid was sufficient—If can revise the order afterwards—Revision to High Court against the later order—High Court, if can then act under S. 12 (*ii*) .. 89

————**S. 12 (ii)**—Scope—Deficiency in court-fee—Erroneous decision regarding category of suit—Appeal to High Court—Power of Court to collect deficient court-fee (F.B.) .. 1

————**Sch. II, Art. 17-A.** *See* S. 7 (IV-A) *supra* .. 640

————**Sch. II, Art. 17-B.** *See* S. 7 (V) *supra* .. 572

PAGE.

Court of Wards Act (I of 1902), Ss. 8 and 52—Suits on behalf of Ward by Collector—Sanction of the Court of Wards previous to filing not obtained—Similar suits already filed with previous sanction—Collector's responsibility—Whether third parties can take advantage of the contravention if at all of the provisions of S. 52 of the Act .. 189

Criminal appeals—Jurisdiction of Sessions Judge to decide whether cases ought to have been decided by the Government Agent or otherwise—Agency tracts .. 759

Criminal Procedure Code (V of 1898), S. 10 (2)—Power of Additional Magistrate to try cases arising under Child Marriage Restraint Act (XIX of 1929) .. 498

————**S. 35**—Sentence in default of fine—If Court can direct it to run concurrently .. 74

————**S. 164**—Confession about disposal of dead body—Non-implication of confession in stages prior to death—If admissible against co-accused on charge of murder .. 750

————**S. 195**—'Court'—Meaning of when a suit is tried by a Judge of the High Court .. 396

————**Ss. 195 and 476**—During trial of a civil suit by a Judge of the High Court, documents found to be fabricated—Complaint under the direction of the trial Judge to the police—Charge-sheet against accused under Ss. 471 and 466 of the Indian Penal Code—No complaint in writing by the trial Court under S. 195, Criminal Procedure Code—Order of committal quashed—Officiating Chief Justice pasing an order under S. 476, Cr. P. Code—Validity of the complaint—Jurisdiction of Officiating Chief Justice to pass the order—Remedy of the accused .. 396

————**S. 204 (3)**—Non-payment of batta to witnesses by complainant—Magistrate whether has power to dismiss the complaint .. 120

————**Ss. 403 (1) and 530**—Accused charged with offence under S. 353, Indian Penal Code—Sub-Magistrate acquitting accused upholding plea of illegality of trial under S. 195 (1) (*a*), Criminal Procedure Code—Fresh complaint before another Magistrate—Plea of *autrefois acquit*—Refusal to entertain the plea—Whether previous acquittal as of right would bar subsequent trial (F.B.) .. 334

PAGE.

Criminal Procedure Code (V of 1898), S. 428—Object of—Prosecution not to be allowed another opportunity to try the case all over again .. 75

————**Ss. 435 and 439**—Order under S. 517—Revision .. 128

————**S. 476.** *See* Ss. 195 and 476. 396

————**S. 488**—Adopted child—If entitled to maintenance from adoptive father—Such child if "his legitimate or illegitimate child" .. 618

————**S. 517**—Scope—Return of property—Order of Magistrate—Revision to High Court—Interference when justified .. 128

Criminal Rules of Practice, R. 85—Confession—Recording of, by Magistrate—Omission to warn as per R. 85—If invalidates confession—Suspicion raised that it is not voluntary .. 750

Criminal Trial—Fine—Payment of—Reversal of sentence—Return of the amount to a person other than the accused—Legality .. 130

Custom—Adoption .. 60

Damages—Obstruction to putting up of a bund—Order of Magistrate under S. 145, Criminal Procedure Code—Suit in consequence—Right to bund established—Obstructor if liable in damages for loss subsequent to the Magistrate's order .. 611

Deceit—Suit for damages—Intention to injure, to cheat or to deceive—Sufficient basis for an action of deceit—Law relating to actions for deceit—Measure of damages—Motor hire purchase system—Misrepresentations as to price and as to initial deposit—Financing firm put to loss—Right to recover damages (P.C.) .. 432

Deed — Construction — Power-of-attorney .. 23

Ejectment—*Jus tertii*—Plea of when open—Plaintiff in joint possession with defendant—If plea available .. 60

Evidence—Admissibility—Case of murder—Information given by deceased before death—Verbal statement—What constitutes—Questions put to injured person—Answers by signs and by nod of head (P.C.) .. 600

————Admissibility—Partition deed unambiguous—Extrinsic evidence inadmissible to construe the same .. 95

————Burden of proof—Promissory note—Undue influence—Good faith—Remuneration for services rendered—Intention at the time of rendering the service—Proper party to state the nature of such intention—Evidence as to conduct consistent with knowledge of expectation of remuneration for services rendered—Relevancy of (P.C.) .. 719

PAGE.

Evidence Act (I of 1872), S. 25—Confession—Admissibility in evidence—Investigation of one crime—Confession regarding different crime .. 154

————**S. 32 (5)**—Statement as to relationship of collaterals made in previous suit—Statement being irrelevant to issue in suit—Effect (P.C.) .. 646

————**S. 44**—Extension to cases of gross negligence (P.C.) .. 113

————**S. 91**—Partition—Oral evidence to prove—Admissibility .. 676

————**S. 111**—Good faith—Burden of proof (P.C.) .. 719

————**S. 114, ill. (c)**—Presumption under—Application of .. 543

————**S. 116**—Lease from *A*—Discovery that *A* is not entitled to the property—Lease from *B*, the real owner—No possession taken under *A's* lease—If estops lessee from pleading that *A* had no title .. 679

————**Ss. 123 and 124**—Privilege when can be claimed for statements—Statements during investigation by a Forest Officer whether privileged—Accused's right to move for their production in Court .. 613

Government of India Act (1919), S. 96-B—Civil Service Classification Rules, R. 14—Failure to comply with—Order of dismissal if invalidated—Proper procedure for dismissal from service—Need for observance by Government (P.C.) .. 529

————**S. 96-B**—Scope and effect (P.C.) .. 529

————**S. 96-B (2)**—Scope and effect—Right of action to enforce rules thereunder (P.C.) .. 515

Government servant—Office held at pleasure—Dismissal—Failure to conduct proper enquiry—Right of dismissed servant to sue for damages (P.C.) .. 529

————Wrongful dismissal—Department enquiry—Prior order permitting retirement on medical grounds—Pension paid for certain time—Subsequent order of dismissal and annulment of pension—Validity—Dismissal by person below the rank of appointing officer—Delegation of power—Validity—Suit for declaration of right to pension and for damages (P.C.) .. 515

PAGE.

Grant—Inam tenure—Grant by Government—Conferment of benefit from generation to generation—Whether constitutes an act of grace on the part of sovereign power—Right to benefit if enforceable in Civil Court (P.C.). 367

————Zamindar making a grant for maintenance—Poruppu payable by the junior member—Nature of the transaction .. 679

Hindu Law—Adoption—Custom—Nattukottai Chetty families—Mother-in-law adopting when daughter-in-law is alive with sapinda's consent—Adoption Muri—Provision for daughter-in-law also adopting—No adoption by daughter-in-law—If adoption valid and adopted son entitled to succeed to properties of adoptive family .. 60

————Adoption—Widow's husband's brother giving consent—Allegations of fraud and corruption with regard to motive for consent found wanting—Adoption valid—Revocation after consent once given by *sapinda*—Not valid (F.B.).. 8

————Alienation—Father's power—Alienation for antecedent debts not illegal or immoral—Father not being manager of family—Son's share in property if bound—Mortgaged property described as self-acquisition of father—Son also joining in execution of deed—Effect—Right of creditor as against son's share of property .. 278

————Alienation by limited owner—Binding nature—Onus of proof .. 268

————Ancestral property—If becomes joint—Existence of wife or daughter (P.C.) .. 312

————Debt—Decree against father alone—Sons not parties to suit or pro-note—Partition after decree to defeat creditor—Partition real and operative—If creditor can execute the decree against properties allotted to sons. 243

————Debt—Father's debt—Partition between father and sons—Shares to father and sons and maintenance provision for wife and daughters—Decree after partition against father alone—If creditor can proceed in execution against other properties not allotted to father .. 249

————Debt—Joint family business—Sole member of coparcenary—Debts incurred by, for the business—Subsequent birth of a coparcener—Mortgage by the old member alone executed after the birth of second coparcener—Suit and decree on mortgage—Only senior member impleaded individually—Decree if binding on junior member—Mortgage, if binding to the extent of debts incurred prior to his birth .. 16

Hindu Law—Debt—Lottery run by father—Subscriptions callected by father—Death of father—Suit by subscriber after his death against the sons—If sons liable to pay out of the joint family property .. 231

————Debt—Mortgage — Grandfther borrowing to assist in the prosecution of the murderer of a member of the family—If a loan either for necessity or benefit to family—Grandsons, liability for—Pious obligation—Nature of decree to be passed .. 331

————Debt—Promissory note by an undivided Hindu father—Suit after his death against his sons—Nature of. 543

————Debt—Suit on a mortgage by conditional sale—Execution by defendants and also on behalf of minor sons—Plea by minor that the mortgage is not binding on his share of properties—Personal decree against minor—No exoneration .. 384

————Debt—Trading family—Junior member in charge of one of the shops belonging to the family—Mortgage for necessary purpose by the member in charge of business—Proof of joint family nature of the business and transactions—Whether such a member could bind the other members with his own debts .. 587

————Hindu undivided family—Family consisting of male coparcener, his wife and daughters (P.C.) 312

————Joint family—Alienation by a coparcener—Tenant of a portion of a house belonging to two brothers—House, an item of joint family property—Sale of the undivided portion of one brother to the tenant—Suit for rent by the other brother—Suit for partition of the purchased share by the vendee—Whether vendee is liable to pay rent—Whether any suit in the alternative for damages will lie .. 501

————Joint family—Business carried on by one member with joint family funds—Nature of—Whether individual concern or joint family concern—Presumption .. 95

————Joint family—Nucleus—Income from, not enough for maintenance of family—Father earning—Spending portions of his earnings on maintenance of family—Acquisitions by father in his own name—If self-acquisitions—Presumptions .. 364

————Joint family—Purchase of a house by manager—If confers a 'benefit' on the estate .. 422

PAGE.

Hindu Law—Marriage—Boy forced to tie *thali* and go through ceremonial of marriage by compulsion—If marriage effected thereby—Effect of subsequent living as man and wife—Ceremonies gone through by boy willingly—Boy aged 18 or 20—Parents opposed to marriage—Validity of marriage .. 192

————Obligation — Nibandha — Analogy of .. 50

————Partition—Division of some items leaving the rest joint—If joint family status continues *re.* undivided items—Presumption of complete partition and intention to partition .. 95

————Succession—Daughter's illegitimate daughters—Claim to grandmother's properties—Existence of legitimate but more distant relatives——Rights by heirship whether vesting in the illegitimate grand-daughters .. 28

————Succession—Plaintiff not born of the same male ancestor as the propositus's paternal aunt's son—Preferential claim whether existing in the plaintiff as against the other—Considerations—Direct descent in the male line necessary for sagotra sapindaship—Analogy of succession as between dancing girls not proper .. 390

————Widow—Suit by the presumptive reversioner questioning alienations by the widow—Remoter reversioners added as parties—If proper—Plea that plaintiff is not the reversioner, on the ground that the last male owner had a posthumous son—Plea attacking plaintiff's status—If joinder proper—Decree embodying declaration against birth of posthumous son—Validity of. 41

————Will—Testator providing for a gift over to grandchildren after widow's enjoyment of properties—Express provisions of sale, gift, etc., in favour of grandchildren—Widow alienating property for the sake of debts binding upon estate—The nature of the estate enjoyed by the widow—Limited interest .. 268

————Woman's estate—Creation of an interest analogous to .. 268

Impartible estate—Debts incurred by the holder—Mortgage of properties by holder and his son—How far binding on the estate—Right of junior members, whether a mere *"spes successionis"* .. 422

————Incidents of—Joint Hindu family—Income from the estate—Nature of (F.B.).. 707

Inam—Inam tenure—History—Rights of inamdar—Long enjoyment of right—Presumption as to lawful origin (P.C.). 367

PAGE.

Income-tax Act (XI of 1922), S. 3—Impartible estate—Income from property—Joint Hindu family—Assessment of holder of estate as an individual—Propriety (F.B.). 707

————**S. 10 (2) (iii)**—Person carrying on money-lending business—Debtors giving him agricultural lands in return for moneys borrowed—Whether he was entitled to a deduction of interest paid by him for business as was represented by the agricultural lands—Whether entitled to a deduction of establishment and other charges (F.B.).. 351

————**Ss. 23 (4), 27, 42, 66 (5)**—Income-tax—Assessment on non-resident company under S. 42 in the name of another company as agent—Claim that profits or gains accrued to it through the agent company—Absence of evidence to support it—Assessee's books, etc., not unbelievable—Income-tax officer to consider the issue in the light of what parties actually did or agreed to—High Court holding there was no evidence—Commissioner then directing further enquiry—If legal—Income-tax officer calling for account books of foreign company again—Non-production of—Assessment under S. 23 (4)—Validity of—Application under S. 27 to set aside assessment—Appeal to Assistant Commissioner—Both adjourned pending disposal of appeal to Privy Council—If proper (P.C.).. 200

————**Ss. 26 (2) and 26-A**—Two separate firms supplying labour to Port Trust authorities—Termination of their contract on a particular date—Tenders called for by the Port Trust authorities—The two firms agreeing to join under a single name and entering into the contract—Supply of labour under the name of single firm—Whether assessable separately on the ground of succession to the same business as required by S. 26 (2) (F.B.). 619

————**Ss. 27 and 49-A**—Order under S. 49-A—Remedy to get rid of—Proceedings under S. 27 (P.C.) .. 200

————**S. 44** — Shell contract—Amounts payable in three instalments—Instrument describing it as 'the annual lease amount'—Whether revenue and not a capital expenditure—Jurisdiction of Income-tax Officer to assess the firm jointly and severally after partnership has discontinued (F.B.) .. 182

PAGE.

Income-tax Act (XI of 1922), S. 55—"Hindu undivided family"—Family consisting of male coparcener, his wife and daughters—Mode of levying super-tax—Coparcener receiving profits as partner—Absence of intention to throw income into common stock—Liability for super-tax (P.C.) .. 312

Injunction—Building of a mosque in a Hindu locality—Attitude taken by Mahomedans not conducive to peaceful living—Civil Court, if can restrain user of building as mosque .. 197

Insolvency—Applicant seeking declaration from the Insolvency Court that a certain amount paid by him on behalf of the insolvent as fine in a criminal action which was reversed later in appeal belonged to him and that it should be returned—Whether claim will lie—Estate of insolvent should be proceeded against—Proof necessary .. 130

————Official Receiver—Legal character of (F.B.) .. 727

Insurance—Policy taken by husband—Wife of the assured mentioned as the person to be ultimately benefited in case of pre-deceasing of the assured—Assignment of policy during assured's lifetime in favour of Bank—Subsequent death of assured—Wife claiming benefit of policy—Assignment will hold good and Bank's claim satisfied. 735

Interest—Award of, on Court-fee paid. 21

Interpretation of Statutes—Reference to rules under .. 559

————Retrospective operation (F.B.). 105

Judicial Committee Rules, 1925, R. 81—Conviction of murder—Petition for leave to appeal *in forma pauperis*—Legal aid—Expenses—Fees of appellant's counsel and solicitors (P.C.) .. 382

Jus tertii—Setting up the plea of—Proper parties to the suit .. 597

Landlord and tenant—Estoppel .. 679

————Merger—Tenant of entire property acquiring ownership as to part—Effect .. 501

————Relationship—Tenant of a portion of a house belonging to two undivided Hindu brothers—Purchase of undivided share from one—Effect—Notice to quit by the other—Repudiation of tenancy by tenant and setting up of title as co-owner—Liability for rent or mesne profits after date of purchase—Damages for use and occupation .. 501

Lease—Lessee holding for term—Sub-lease to another for the same period—Termination of term of main lease—Lessee not surrendering to landlord—Sub-lessee in use and occupation—Renewal of lease in his favour—Suit for arrears of rent against original lessee for the period up to renewal—Lessee suing his prior sub-lessee—Liability of sub-lessee .. 566

Lease—Possession with lessee—Stranger trespassing—If and when adverse to lessor .. 679

Limitation Act (IX of 1908), Ss. 4 and 19—Period prescribed in S. 19—Meaning of—If takes in additional period under S. 4—Endorsement of payment after period of limitation but within the period extended by S. 4—If saves limitation .. 262

————**S. 12 (2), Sch. I, Art. 151**—Procedure—Appeal from order of High Court—Out of time—Unavoidable delay—"Time requisite for obtaining copy of order"—Exclusion (P.C.) .. 702

————**S. 14**—Mortgage suit—Suit in ordinary Civil Court—Properties situate outside in Agency jurisdiction—Decree for sale of all properties—Execution of—Number of execution petitions—Later decision holding decree so far as directed sale of properties in Agency area illegal—Subsequent suit in Agency Court—Time taken in suit stage and execution stage—If whole period deductible—'Civil proceeding'—Meaning of .. 303

————**Arts. 7 and 102**—Applicability—Cook employed in hotel—Suit for recovery of arrears of salary—Bar of limitation—Meaning of "household servant" .. 329

————**Art. 102.** *See* Arts. 7 and 102. 329

————**Art. 120**—Applicability — Suit by Zamindar against inamdar to recover cess paid to Government (F.B.). 91

————**Art. 151.** *See* S. 12 (2) *supra* (P.C.) .. 702

————**Art. 166** — Applicability — If overrides special provisions of the C. P. Code to the contrary .. 569

————**Art. 182 (2)**—Mortgage suit—Preliminary decree—Appeal against—Final decree passed pending appeal—Execution petition filed after appellate decree—'Appeal' in Art. 182 (2)—If means only appeal against final decree or includes appeal against preliminary decree—If original final decree can itself be executed or a fresh decree need be passed .. 407

————**Art. 182 (2) and (5)**—Word 'appeal' whether includes 'revision'—Final order in Art. 182 (5)—Whether

PAGE.

would comprehend mere rejection of an execution application—Legal representative of one of the defendants not brought on record properly in execution application—Whether application defective and not in accordance with law—Application against other defendants would save limitation in regard to the legal representative of one of them also (F.B.) .. 453

Lunatic—Estate of lunatic managed by committee—Accounts not filed for a period of 21 years—Amounts without previous sanction of Court spent—Retrospective sanction by Court afterwards on enquiry—Whether Court empowered to do so—Exceptional circumstances existing for the Court sanctioning the expenditure .. 287

Madras Abkari Act (I of 1886), S. 58—Proof of offence under—Illicit possession of arrack—Appeal against conviction—Appellate Magistrate holding possession not to be illegal—Order for fresh trial—Propriety .. 75

Madras City Municipal Act, S. 98 and S. 129 (as amended by S. 77, Act X of 1936)—Revenue and penal legislation—Strict construction .. 138

———**S. 98 (f)**—"Timber"—Whether includes plywood—Liability of manufactured article to taxation .. 138

Madras City Tenants Protection Act (III of 1922), Ss. 3; 4; 5 and 11—Purchase of superstructure from tenants in execution—Suit for ejectment—Decision that leasehold right inhered in the tenants—Later purchase by the same purchaser of the site also from owner—Second suit for ejectment and recovery of possession of both site and superstructure—Notice of three months' time to tenants not given—Suit not maintainable .. 507

Madras District Municipalities Act (V of 1920)—Profession tax—Payment of, on service of demand notice—Notice stating that in default of payment, his property will be distrained—No "express protest"—If payment one under protest .. 496

———**Ss. 86 and 345**—Profession tax—Suit for recovery—Limitation—Starting point—Date of service of bill demanding payment—Whether material .. 440

———**Sch. 4, R. 30 (2)**—Prosecution under—Non-payment of profession tax—Accused if can plead non-liability in defence—Prosecution to prove liability to tax .. 274

PAGE.

Madras District Police Act (XXIV of 1859), S. 53—"Anything done or intended to be done under the provisions of the Act"—Malicious act of police officer—Suit by injured party for damages—Special period of limitation if applicable .. 580

Madras Estates Land Act (I of 1908), S. 3 (4) (f)—Fruit garden—Cocoanut plantation on dry land—Liability of tenant for additional rent. (F.B.) 233

———**S. 52**—Three undivided brothers owning the estate—Tender of patta by the manager alone—Manager not recognised or registered as landholder—If valid .. 88

———**Ss. 125 and 147**—Holding owned by two persons—Registered only in one's name—Landlord believing person in possession to be the heir—Arrears of rent—Suits against registered holder—Decrees therein—If binding on the others also—Death of one co-owner—Will by deceased—Legatee—No steps taken by, to notify to landholder—Later sale by legatee Decree obtained against registered holder—Transfer not notified to or recognised by landholder—Decree binds legatee as also transferee—Mortgage by ryot prior to Estates Land Act—Later mortgage after Act to repay earlier loan and extra advance—Invalid—Decree on later mortgage—Decree-holder purchaser—Landholder bound by the earlier mortgage and rent sale subject to rights under earlier mortgage .. 399

Madras Hereditary Village Offices Act (III of 1895), Ss. 13 and 21—Suit by a person actually holding the office for emoluments—Jurisdiction—If maintainable in Revenue Courts .. 37

Madras High Court Original Side Fee Rules, Rr. 35 and 36—Final judgment—What constitutes .. 346

Madras Hindu Religious Endowments Act (II of 1927), S. 9 (5)—'Excepted temple'—Definition altered in 1930—Power of the Board to alter its previous decision regarding the nature of temple (F.B.) .. 105

———**S. 18**—Order in the exercise of power vested by—Administrative Act—Writ of *certiorari* against .. 442

———**Ss. 62 and 63**—Petition for framing a scheme—Board's decision rejecting the petition—Suit in Court to set aside the decision of the Board—Scope of S. 63 .. 559

———**S. 63 (1) (c)**—Power to frame scheme for management of properties—Power to settle properties

PAGE.

and ascertain them—Paid co-trustee —Powers of, as a co-trustee under the general law—Mahant already existing not to be superseded .. 475

Madras Hindu Religious Endowments Act (II of 1927), S. 84— Decision under—Finality of (F.B.) .. 105

Madras Hindu Religious Endowments Amendment Act (IV of 1930) —Decision in 1927 that temple is "an excepted temple"—Definition changed in 1930—Board holding later it is not an excepted temple—If valid—Retrospective operation (F.B.) .. 105

Madras Impartible Estates Act (II of 1904), S. 4—Effect of—Alienation by a member—How far valid .. 422

Madras Irrigation Cess Act—Inam lands—No document of grant available—Evidences from conduct proving inamdar's right of ownership of tank and feeder channel, the sources of irrigation for his lands—Proof sufficient—Immunity from water cess not restricted to mamool wet lands .. 159

————**S. 1, proviso—**'Source'—Interpretation of .. 321

————**S. 1 (b)—**Ryot liable to take water from a source for wet crop—His taking water throughout the year instead of the restricted supply he was entitled to for raising the wet crop—Penal assessment if proper .. 321

————**S. 1 (b), proviso—**"Irrigated by using without due authority"—Interpretation of (F.B.) .. 732

Madras Local Boards Act (XIV of 1920), S. 88—First proviso—If applies to pre-settlement inams—"Intermediate landholder"—Pre-settlement inamdar in occupation of land—If and when can be one (F.B.) .. 91

————**S. 222 and Sch. IV, Rr. 25, 32 and 33—**Preparing list of taxpayers—Individual notices if necessary —Non-payment of tax—Prosecution launched by Panchayat Board—Time-limit—Distraint becoming impracticable—Removal of movables by assessee —Expiry of period of limitation for prosecution .. 101

————**Sch. IV, Rr. 25, 32 and 33.** 101

————Election Rules—Rules for preparation of Electoral Rolls, Rr. 12, 13 and 14—Effect of R. 12—Appeal forwarded through Election Officer—Right of appellant to be heard—Duty to communicate his desire to be heard. 157

Madras Prevention of Food Adulteration Act (III of 1918), S. 6 (2) —Charge under S. 5 (1) against employer—Trial of—Defence that servant sold contrary to master's orders —Case for prosecution closed—Application under S. 6 (2) to summon the servant and examine him—If can be rejected as late—*De novo* trial—Failure to renew the application under S. 6 (2)—If accused precluded from questioning the legality of trial .. 338

Madras Survey and Boundaries Act (VIII of 1923), S. 14—Boundary dispute between two neighbouring estates —Landholders alone parties—Ryots in possession of lands in the estates, if necessary parties—Application to add ryots after three years .. 662

Madras Town Nuisance Act (III of 1889), S. 3 (5)—Seller of gramophone records—Playing gramophone for a prospective buyer inside the shop—Crowd collecting outside—If playing gramophone in the circumstances, an offence .. 310

Malabar Compensation for Tenants' Improvements Act (I of 1900), S. 19—Clause in a lease providing for full value of trees cut by tenant—Cutting not an improvement or for improvements—Trees of spontaneous growth after lease—Cutting of—If landlord entitled to value of trees or only reasonable compensation .. 324

Malabar Law—Suit for redemption by melcharthdar—Conditional decree. *See* Mortgage (F.B.) .. 83

Married Women's Property Act (III of 1874 as amended by Act XIII of 1923), S. 6—Construction—Policy of life—Assurance for benefit of assured or his wife in case he pre-deceased her—Trust in favour of wife, if created at once .. 735

————**S. 6—**Trust, when arises .. 735

Maxims—*Ex pressio unius* .. 28

————*Sic uteri tuo ut alienum non laedas*—Limits of .. 197

Minor—Guardian *ad litem* representing in a small cause suit—Promissory note executed by minor's undivided uncle in the course of trade—Trade not ancestral—Liability of minor—How far binding on family properties in his hands—Question of gross negligence raised—Omission to take proper pleas affecting minor—Liability of minor how far sustainable—Omission to take a correct defence as well as putting forward an absurd defence amounting to gross negligence .. 224

Mortgage—Suit for redemption by melcharthdar—Decree conditional on pay-

PAGE.

ment of compensation—Failure to deposit—Application by jenmi for time to deposit—Failure of jenmi also to deposit—Later suit by jenmi for redemption—If barred—Right of jenmi to sue during the pendency of the melcharth (F.B.) .. 83

Negligence—Tree being in old and dangerous condition—Municipal Council being aware of such condition—Erection of posts by Council—Tree subsequently falling and injuring post—Liability of owner of tree for damages—Conduct of Municipal Council in not taking steps for removal of tree—Whether amounts to contributory negligence .. 125

Negotiable Instruments Act (XXVI of 1881), S. 118—Applicability—Promissory note by an undivided Hindu father—Suit after his death against his sons—Nature of—Onus of proving consideration on the payee—Liability of non-executants to the note .. 543

Nuisance—Building of a mosque in Hindu locality—If *ipso facto* a nuisance .. 197

Partnership—Partners—If co-owners (F.B.) .. 174

Partnership Act (IX of 1932), Ss. 69 and 74—Partnership unregistered—Suit against a debtor for money borrowed before the Act came into force—S. 74 whether affects it—Suit not maintainable .. 610

Penal Code (XLV of 1860), S. 188—Offence under—Disobedience of order of District Superintendent of Police prohibiting processions without license—Knowledge of order, if essential .. 473

————**S. 266**—Essentials of offence under—Knowledge as to weight being false—Proof—Statement of accused made before Magistrate .. 154

————**Ss. 300, 302 and 326**—Quarrel between two persons—Accused entering house and returning with heavy rice pounder—Inflicting injury with rice pounder—Woman interfering on behalf of injured person—Single fatal blow dealt to woman—Death taking place after one week—Nature of offence—Death caused in rage and without long premeditation—Sentence. 743

————**S. 326**—Offence under, if constituted—No grievous hurt in fact—Knowledge of likelihood of grievous hurt .. 750

Pensions Act (XXIII of 1871), Ss. 48 and 6—Effect (P.C.) .. 515

Police Act (V of 1861), S. 32—Order of District Superintendent of Police prohibiting processions without license—Disobedience of—Knowledge of order, an essential ingredient .. 473

Power of Attorney—Authentication to execute and register *kabuliyat*—Validity of presentation of document for registration (P.C.) .. 479

————Construction .. 23

Practice—Questions of fact—Finding of trial Judge—Right of appeal—Finding not to be lightly interfered with—Judgment found erroneous after full consideration of case—Duty of appellate Court to interfere (P.C.) .. 538

Practice and procedure—Counsel engaged in another Court—Courses open to members of the bar .. 632

Principal and agent—Principals export and import merchants—Power to purchase goods—If includes power to borrow in general or receive deposits—Liability of principal for moneys deposited with agent .. 23

Promissory note—Burden of proof—Plea of nominal transaction—Allegation of—Illegality vitiating the note—Note alleged to have been executed in pursuance of an attempt to stifle prosecution—Lower Court finding against—Illegality of consideration—The Court must be satisfied as to the vitiating circumstances—Onus on the defendant alleging them, to prove such circumstances .. 414

————Undue influence—Burden of proof (P.C.) .. 719

Provincial Insolvency Act (V of 1920), S. 3—Subordinate Court dealing with insolvency petition—Insolvency arising out of limit of jurisdiction of Subordinate Court—Notification of Government—Transfer by District Judge to Subordinate Court, whether proper .. 654

————**Ss. 28 (7) and 34 (2)**—'When he is adjudged an insolvent' in S. 34 (2)—Material date—If date of petition or date of adjudication—Effect of relation back of order of adjudication. 637

Provincial Small Cause Courts Act (IX of 1887), Ss. 16, 33 and 35—Suit on promissory note—Small cause suit in nature—Prior District Munsif having small cause jurisdiction—Successor not having small cause jurisdiction—Suit re-numbered as original suit—Return of prior Munsif—Suit by mistake retaining its description as a regular suit—Trial as original suit—Whether proper—Whether decree appealable .. 14

PAGE.

Railway Company—Consignment of oil-cakes—Declaration that they were to be used as manure—Concession rate charged thereon—The company discovering later that the declaration is wrong—If can re-classify the consignment and collect excess—South Indian Railway Company Goods Tariff, Part I, Rr. 15 and 20—Onus on consignee to prove that description is correct .. 341

Registration Act (XVI of 1908), Ss. 17 and 49—Hindu joint family—Partition lists not registered—Partition to be proved to show necessity for a promissory note—Inadmissible in evidence .. 676

———**S. 17 (1) (b)**—Mortgage—Registered document necessary to extinguish right under .. 469

———**S. 32**—Document executed by two or more persons—Presentation by agent of one of them—If sufficient (P.C.) .. 479

———**S. 33 (1) (a)**—Construction—'Resides'—If excludes temporary residence (P.C.) .. 479

———**Ss. 74 and 75 (4)**—Enquiry by Registrar regarding execution of a document—Direction as to costs—Execution to conform to Civil Procedure Code, O. 21 .. 635

Sea Customs Act (VIII of 1878), Ss. 167 and 186—Obstruction to Customs Officer—What constitutes—Person going on cycle—Customs peons shouting for purpose of search—Rider of cycle escaping by side track—Offence whether constituted .. 178

Secretary of State—Action against (P.C.) .. 515
(P.C.) .. 529

Specific Relief Act, S. 42—Declaratory suit by presumptive reversioner—Maintainability .. 41

———**S. 45**—Petition under—If maintainable against the Income-tax Commissioner (P.C.) .. 200

———**S. 45 (g)**—Scope (P.C.) .. 200

Stamp Act (II of 1899), S. 2 (10)—"Conveyance"—Contract regarding allotment of shares by company—Statement in Form VII filed before Registrar under S. 104, Companies Act—Whether amounts to transfer of property or agreement—Stamp duty payable thereon (F.B.) .. 108

———**Ss. 2 (15) and 6, Arts. 45 and 46-B**—Partnership with five partners—Dissolution of—Deed allotting the net assets in two groups between them—If an "instrument of partition"—'Severalty' in S. 2, cl. (15)—Meaning of—If division must be between *individuals*—Instrument also a deed of dissolution—Effect of—Chargeable as partition deed, by reason of S. 6, under Art. 45 though it may also fall under Art. 46-B (F.B.) .. 174

Stamp Act (II of 1899), S. 35—Promissory note—Insufficiently stamped—Whether could be used as an acknowledgment of original debt .. 163

———**Arts. 45 and 46-B** (F.B.) .. 174

Succession Act (XXXIX of 1925), S. 321—Pronote by executrix for probate expenses—Creditor if can have recourse to the estate—S. 321, if creates a charge for the amount—Scope of S. 321 .. 447

Surety—Contract of—Letter of surety stating his willingness to be bound to the extent of Rs. 250 for transaction up to a year—Value of goods supplied exceeding the sum fixed in the letter of guarantee—Whether surety discharged on account of the amount exceeding the stated figure—Limit how far effective .. 143

———Liability to pay interest .. 143

Transfer of Property Act (IV of 1882), Ss. 14, 16, 17 and 18—Applicability—Invalidity of part of gifts—If fatal to the other valid dispositions (P.C.) .. 166

———**S. 36**—Zamindar—Rent due from lessees and occupancy ryots—Death of Zamindarini in the middle of the fasli—Rents, if apportionable between person heirs of Zamindarini and succeeding Zamindar or go with the Zamindari .. 77

———**S. 105**—Grant of a village to a junior member by the holder of an impartible estate for maintenance—*Poruppu* payable by the junior member—If grant a lease—Oral grant, if valid—Evidence Act, S. 116 (F.B.) .. 679

Trust—Creation of—Requisites of valid trust .. 10

———Deed of settlement—Direction for appropriation of property—Objects partly educational and charitable, and partly benevolent—Validity—Administration of trust by settlor and by trustee after his death—Suit by settlor's heir for avoidance of trust deed and for possession—Invalidity of part of gifts—Whether good ground for ejectment of trustee (P.C.) .. 166

Water-cess—Inam lands .. 159

PAGE.

Water and water-courses—Zamindari—Stream rising in Zemindari—Passage through defendant's village—Tributaries feeding the stream—Course of tributaries wholly in defendant's village—Waters flowing in well-defined channels to a stream P and then into a tank—Tank and stream P jointly owned—Obstruction to course of tributaries—If actionable wrong. (F.B.) 216

Will. *See* Hindu Law—Will.

———Construction—Gift to "institutions, societies or objects established in or about Auckland for charitable, benevolent, educational or religious purposes"—If valid (P.C.) .. 58

———Genuineness — Circumstances—to be considered—Unnatural character of dispositions (P.C.) .. 646

PAGE.

Words and Phrases—'Appeal' (F.B.) 453

———'Benevolent' (P.C.) .. 58

———'Cocoanut'—If fruit (F.B.) .. 233

———'Final judgment' .. 346

———'Hindu undivided family' (P.C.) 312

———'Household' .. 329

———'Kattukuthagai' .. 159

———'Nemnook' (P.C.) .. 367

———'Poruppu'—Meaning of .. 679

———'Proceeding' .. 659

———'Tax payable' (F.B.) .. 182

———'Timber' .. 138

Zamindari—Enforcement of obligation against—Legality .. 50

PRINTED AT THE MADRAS LAW JOURNAL PRESS, MYLAPORE, MADRAS.

RULES.

REVISED RULES REGARDING PLEADERS' CLERKS IN MUFASSAL CIVIL AND CRIMINAL COURTS.

1. The rules shall come into force on the day of 1st January, 1937, in the Civil and Criminal Courts in the mufassal.

2. In these rules, the expression "Pleader" means and includes all legal practitioners recognised under the Legal Practitioners Act; "District Judge" means the Judge having jurisdiction over a judicial district; "District Magistrate" means a magistrate of the first class appointed by the Local Government for every district, outside the Presidency town; "recognised clerk" means a clerk employed by a pleader and permitted as such to have access to the Courts in which his employer is authorised to practise and to the offices attached thereto.

3. A pleader shall have at a time not more than two recognised clerks unless the District Judge by general or special order otherwise directs.

4. The District Judge shall maintain a register (as shown in Annexure I) of all recognised clerks employed within his jurisdiction. The District Judge shall direct his Sarishtadar to issue under his signature to each recognised clerk, a card, which shall be strictly non-transferable in the form printed as Annexure II and it shall be produced by the holder upon request of a member of the Court establishment. These cards shall be forwarded to the District Judge for renewal at the close of each year by the pleader under whom the recognised clerk is working through the Judge or Magistrate presiding in the Court in which the pleader ordinarily practices.

5. The register prescribed by R. 4 shall contain the name, father's name, and residence of each recognised clerk, the date of his registration, the name of the pleader by whom he is employed, the Courts in the districts in which his employer is authorised to practise, the date of his removal from the register and a column for remarks. Copies of the register shall be supplied by the District Judge at the commencement of each year to all subordinate Civil Courts within his jurisdiction and to the District Magistrate of the District, for supply to Magistrates subordinate to him in the district.

6. No clerk employed by a pleader shall as such be allowed access to any of the Courts of the district, or to any of the offices attached thereto, unless he is for the time being a recognised clerk.

7. Whenever a pleader ceases to employ a recognised clerk, he should notify the fact to the District Judge. The District Judge will thereupon order the removal of such recognised clerk's name from the register and the cancellation of his card and notify the fact of removal to other Civil Courts in the district, and to the District Magistrate of the district for communication to the Subordinate Magistrates in the district.

If on the death, retirement, discharge or dismissal of a recognised clerk, a pleader wishes to engage another in his place, he shall apply to the District Judge for recognition. He shall be entitled to look into the register (copy of which is maintained in all the Civil and Criminal Courts in the district) to satisfy himself whether the person seeking his employment had previously been in the employment of another pleader.

8. The District Judge may for misconduct order the removal of a recognised clerk's name from the register and the cancellation of his card. In such an event a notification similar to that provided for in R. 7 shall be made.

9. The District Judge may, at his discretion, refuse to register again a clerk who has once been removed from the register on account of his dismissal or discharge. No appeal shall lie against the refusal of the District Judge to re-register a clerk who has been removed from the register for the reasons aforesaid.

10. No person registered as the recognised clerk of one pleader shall do business in the Courts or offices thereof on behalf of any other pleader, except in the case of illness or absence on leave of any recognised clerk, when the presiding Judge or Magistrate of the Court may on the written requisition of the pleader under whom the recognised clerk is engaged permit the recognised clerk of another pleader to discharge the absentee's duties for a period not exceeding 15 days. Provided, however, that a recognised pleader's clerk may serve more than one pleader, if the pleaders work together in the same office as father and son, or brothers or as partners. Any recognised clerk who contravenes this rule, shall be liable to be struck off the register.

11. District Judges should submit to the High Court on or before the 31st January, of each year, a statement showing (*a*) the number of recognised pleaders' clerks whose names are in the register on the last date of the year and (*b*) the number of such

recognised clerks who have applied for the renewal of their cards, for the succeeding year.

12. Nothing in these rules shall be deemed to authorise indiscriminate entry of pleaders' clerks into the offices attached to Courts, or any violation of the High Court Circular Dis. No. 168, dated the 6th February, 1905 (Annexure III).

Annexure I.

FORM.

Register of Recognised Clerks of Pleaders.

Serial Number	Name	Father's Name.	Residence.	Date of registration.	Name of the Pleader under whom employed.	Courts in which the Pleader is authorised to practice.	Date of removal from register.	Remarks.

Annexure II.

FORM.

Form of Card for Pleaders' Recognised Clerks.

Recognised Clerk's Card No.

(Not Transferable.)

This is to certify that
son of now residing at
is a recognised clerk employed by pleader, and that he is entitled in connection with his employer's business to have access to , and to offices attached thereto.

Dated the

Sarishtadar,
District Court.

Annexure III.

NOTICE.

Dis. No. 168 of 1905.

In supersession of Circular Dis. No. 1154, dated 20th Dec. 1904, the following order is issued by the High Court for the information and guidance of all Civil Courts subordinate to the High Court:—

No pleader, pleader's clerk, party or other person not belonging to the establishment should ever be allowed to enter the office room in which the clerks are employed. The only clerk with whom the outside public is allowed to deal is the chief ministerial officer of the Court, and he should sit apart from the other clerks, in a separate room, if possible, and should there receive plaints, petitions, etc., and answer such questions, as pleaders and others are entitled to ask him. It is utterly subversive of all discipline to allow pleader's gumastas to go into the clerks' room to talk to them and see papers there.

Note.—This order is not intended to prohibit pleaders and others who have business with the Superintendent of Copyists, or the Nazir, or Deputy Nazir, or, in a District and Sessions Court, with the Head Clerk, from consulting those officers in the rooms where they sit.

(*Fort St. George Gazette*, Part II, pages 1692-1693 dated 22nd December, 1936.)

THE

Madras Law Journal Reports

1937]   SUPPLEMENT.   [I

[FULL BOARD.]

IN THE BOARD OF REVENUE AT MADRAS.

PRESENT:—DIWAN BAHADUR N. GOPALASWAMI AYYANGAR, COMMISSIONER OF LAND REVENUE AND SETTLEMENT, MR. C. A. HENDERSON, COMMISSIONER OF LAND REVENUE AND MR. A. H. A. TODD, COMMISSIONER OF SEPARATE REVENUE.

Maharajah of Parlakimidi . ... *Petitioner**

v.

The Ryots of the Villages of Garabanda, Sariapalli and Ramachandrapuram .. *Counter-Petitioners.*

F.B. — Maharajah of Parlakimidi *v.* Ryots of the villages of Garabanda, Sariapalli and Ramachandrapuram.

Madras Estates Land Act (I of 1908), S. 168 (2)—Construction—' Shall have regard to'—Settlement of rent under Chapter XI—Rise in prices—Enhancement of rent due to—Principles applicable—Settlement Officer if restricted to the limit of 12½ per cent. imposed by S. 30 (i) (b).

A survey of an estate was made between 1861 and 1865 and tarams were assigned to each block of land therein. Money rates were fixed in 1867-1868 and were paid unbrokenly since then. The landholder of the estate filed a few suits for enhancement under Chapter III and obtained decrees for an increase but only of 2 annas in the rupee. Finding that the filing of summary suits for the purpose of getting enhancement against the ryots of the whole zamindari would be a prolonged and tedious process, the landholder applied for a Record-of-Rights and settlement under Chapter XI of the Act. He also urged that the Revenue Officer making a settlement under S. 168 would not be bound by the 2 anna limit in S. 30. The Settlement Officer found that an enhancement of 100 per cent. would be fair and equitable and raised the prevailing rates of rent by 100 per cent. On appeal under S. 171, the Board of Revenue (Commissioner of Land Revenue alone) held that the Settlement Officer was bound by the provisions of Chapter III of the Act and the enhancement which on the ground of rise in prices he was competent to order in the existing money rates was only 12½ per cent. and directed the revision of money rents accordingly. On an application made in revision to the Collective Board,

Held (by MR. HENDERSON AND MR. TODD, Commissioners), that the restriction on enhancement of rent due to a rise in prices which is imposed by the

* B.P. Mis. No. 3523 in R. P. No. 79 of 1936.   9th October, 1936.

F.B.

Maharajah of Parlakimidi v. Ryots of the villages of Garabanda, Sariapalli and Ramachandrapuram.

second proviso to S. 30 (i) (*b*) cannot be held to apply with equal force to the fixation of fair and equitable rent in settlement proceedings under Chapter XI. The Settlement Officer is not restricted to the arbitrary limit of 12½ per cent. which is imposed by S. 30 (i) (*b*) on the enhancement permissible in the case of an application under Chapter III. The phrase 'shall have regard to' in S. 168 (2) should be construed as 'shall take into consideration'.

An enhancement of 37½ per cent. would not be oppressive in view of the circumstances of the case.

Valluri Narasimha Rao v. *The Ryots of Peddamamidipalli*, (1925) I.L.R. 49 Mad. 499, explained and relied on.

Rajah of Mandasa v. *Jagannayakulu*, (1931) 63 M.L.J. 450 (F.B.), applied.

Per DIWAN BAHADUR GOPALASWAMI AYYANGAR (*Commissioner*) *dissenting*:—The provisions of the Act referred to in S. 168 (2) are those in Chapter III and those applicable to the present case are contained in Ss. 30 (i) and 31. The decision to allow 37½ per cent. pays no regard to these two provisions either independently or in combination. The words 'shall have regard to' in S. 168 (2) can only be interpreted to mean 'shall follow to the extent possible'; they cannot mean merely 'shall take into consideration' or permit the Settlement Officer to disregard them in favour of what he may regard as fair and equitable.

In the opinion of the legislature, any enhancement at a time of over 12½ per cent. should not be allowed.

Application in revision under S. 172 of the Estates Land Act against the order of the Board of Revenue in Settlement Rent Appeal No. 4 of 1936.

L. S. Veeraraghava Aiyar for the Petitioner.

T. R. Venkatarama Sastri and *B. Jagannadha Das* for the Counter-Petitioners.

Mr. C. A. Henderson, Commissioner of Land Revenue and Mr. A. H. A. Todd, Commissioner of Separate Revenue, passed the following

ORDER. This is an application made in revision under S. 172 of the Estates Land Act against the order of the Board of Revenue in Settlement Rent Appeal No. 4 of 1936, dated the 30th March, 1936, preferred by the landholder, the Maharajah of Parlakimidi. The application has been considered by the Collective Board as prescribed by the Explanation to S. 172 of the Act.

2. The essential point at issue is the extent to which the operations leading to a settlement of rents under Chapter XI of the Act are controlled by the provisions applicable to suits (now applications) contained in Chapter III of the Act; and in particular whether the restriction on enhancement of rent due to a rise in prices, which is imposed by the second proviso to S. 30 (i) (*b*) of the Act, should be held to apply with equal force to the fixation of fair and equitable rents under Chapter XI.

3. It is the case for the petitioner that operations under Chapter XI are not so controlled; that the fair and equitable rent

F.B.

Maharajah of Parlakimidi *v.* Ryots of the villages of Garabanda, Sariapalli and Ramachandrapuram.

to be fixed under Chapter XI is to be distinguished from the lawful rent provided for with a limit on enhancement under Chapter III; and that the Revenue Officer (now Collector) is not bound to govern himself absolutely by any one provision of the Act.

4. The part of Chapter XI which does appear to attract the provisions of Chapter III is the second half of S. 168 (2). This clause lays down that:

> "The Collector shall presume until the contrary is proved that the existing rent or rate of rent is fair and equitable and shall have regard to the provisions of this Act for determining the rates of rent payable by a ryot."

The first part of the clause re-enacts in effect S. 28 of the Act, which, by itself, is applicable to all proceedings under this Act; and this has been adduced before us as an argument to show that Chapter XI contemplates an entirely independent system of the fixation of rents.

5. It is, however, with the wording of the second half of the clause that we are directly concerned; that is, with the meaning of the phrase "shall have regard to" in this connection. In the order sought to be revised, it has been held that this means that the Settlement Officer was bound by exactly the same restrictions as a Revenue Court would be in determining the amount of enhancement to be allowed in a suit (now an application) for enhancement based on a rise in prices. In our opinion, this is to read more into the wording of the phrase than it can sustain, in the absence of more specific direction. For the phrase, itself borrowed from a rather different context in the analogous but not identical section of the Bengal Tenancy Act, appears to have no special or technical, legal sense here. It is used also in S. 32 (1) (*b*) of the Act, where the context shows that no such rigid sense can be attached to it. We do not consider that the phrase can bear any more definite meaning than that of ordinary usage, "to take into consideration"; and that this meaning is inadequate to support the interpretation that the Settlement Officer is restricted to the arbitrary limit of 12½ per cent. which is imposed by S. 30 (i) (*b*) on the enhancement permissible in the case of application by suit (now application). If that were the meaning, we should certainly expect to find a specific re-enactment in some form of this most important restriction in the same way as the provision of S. 28 has been re-enacted in the first part of S. 168 (2) and the provision of S. 37 virtually in S. 177.

6. The point that we have under consideration has been the subject of pronouncements by the High Court, to which our attention has been drawn. In *Valluri Narasimha Rao* v. *The Ryots of*

F.B.

Maharajah of Parlakimidi *v.* Ryots of the villages of Garabanda, Sariapalli and Ramachandrapuram.

Peddamamidipalli[1], the point in issue was considered, and the Bench decided that the Revenue Officer was not bound by the terms of S. 30 in fixing a fair and equitable rent. And although the question of the High Court's jurisdiction was subsequently decided against that ruling in *Rajah of Mandasa* v. *Jagannayakulu*[2], the Full Bench in the latter case gave particular attention to the functions of the Revenue Officer as the basis of their decision that his proceedings were not those of a Civil Court, and that in consequence, the proceedings of the Board of Revenue in appeal or revision of those proceedings were not those of a Civil Court either. The pronouncements then made certainly re-affirmed the previous decision in regard to the function and status of the Revenue Officer. In one passage, to which our attention has been particularly called, Reilly, J., observes in *Rajah of Mandasa* v. *Jagannayakulu*[2]:

> " Where the settling officer has to deal only with such questions as would arise in a suit for commutation or for enhancement or reduction of money rent, under S. 168 (2), he must be guided by the appropriate principles as set out in the Act."

This seems to us to be an appropriate, explanatory paraphrase of the words "shall have regard to the provisions of this Act for determining the rates of rent payable by a ryot"; but it is far from laying down that the precise directions with which a Revenue Court must comply under Chapter III are equally binding on the settling Officer, whose prime function, as laid down in S. 168 (1), is to settle a fair and equitable rent. Similarly, Anantakrishna Aiyar, J., at pages 503, 504:

> "There is no real analogy between the essential nature of the proceedings under Ss. 30, 38 and 40 of the Act on the one hand, and those taken under the provisions of Chapter XI on the other. . . . The Revenue Officer . . . . . . while he shall have regard to the provisions of the Act in determining the rates of rent payable by a ryot, is entitled to travel outside the provisions of Ss. 30, 38 and 40, etc.

7. We would conclude, then, that when the prime duty of the Revenue Officer is to fix a fair and equitable rent, he must be guided by the principles underlying the provisions of the Act contained in Chapter III; but not to the extent of being thereby prohibited from arriving at a rate of rent which is fair and equitable as far as may be, to both parties. It is clear that the principle informing the proviso to S. 30 (i) (*b*) is that the rate of enhancement should not be too suddenly or too severely enhanced at any one time.

8. In the present case the Settlement Officer has found that an enhancement of 100 p. c. would be fair and equitable. With this

1. (1925) I.L.R. 49 Mad. 499.
2. (1931) 63 M.L.J. 450 at 486 (F.B.).

F.B.

Maharajah of Parlakimidi *v.* Ryots of the villages of Garabanda, Sariapalli and Ramachandrapuram.

conclusion we are unable to agree. Such a drastic revision of the economic status of the ryot population and of the relations between the landholder and his tenants is not and cannot be fair. But in consideration of the length of time that has elapsed since the last tentative settlement of rents in 1867-68, of the prodigious rise in prices that has taken place during that period and of the general improvement in the economic condition of this tract of country in other respects, we consider that an enhancement of six annas in the rupee, or 37½ p.c., would not be oppressive and direct the Settlement Officer to revise his rates accordingly; while to mitigate the suddenness even of this increase the enhancement should be spread over a period of five years, to be paid in equal instalments as provided by Rule 22.

*Order passed by Diwan Bahadur N. Gopalaswami Ayyangar (*dissenting*).—I regret I am unable to agree in the decision reached by my two colleagues and, in view of the great importance of the issue in the interpretation and administration of the Estates Land Act must record this dissent.

The rents in the estate are money rents and the rates for the different tarams have remained unaltered since 1867-8. The simple and narrow issue for decision is, what is the enhancement which, on account of the rise in prices, can be sanctioned in settlement proceedings under Chapter XI of the Act?

Chapter XI itself contains no provisions which indicate what would be the proper enhancement. The only direction it contains is that in the latter part of S. 168 (2) *viz.*, that the officer settling rents "shall have regard to the provisions of this Act for determining the rates of rent payable by a ryot". Admittedly the provisions referred to here are those in Chapter III. The provisions in Chapter III relating to the enhancement of rates of money rent on the ground of a rise in prices are contained in S. 30 (i) and S. 31. The first of these provisions fixes the maximum enhancement to be sanctioned at any one time at 12½ p.c.; the second directs that the ascertainment of a rise in prices should be confined to the price-history of the 30-year period immediately preceding the proceedings in which the enhancement is claimed and that the comparison should be of the average price of the last decade with that of the first decade of this 30-year period. The decision to allow a 37½ p.c. pays no regard to these two provisions either independently or in combination. What is allowed is thrice the maximum enhancement obtainable under the provisions in Chapter III and is mainly supported by a rough comparison of present prices with those 60 years ago. I

* 10th February, 1936.

F.B.

Maharajah of Parlakimidi *v.* Ryots of the villages of Garabanda, Sariapalli and Ramachandrapuram.

find it impossible to agree that this complies with the direction in S. 168 (2) and that such a decision can be deemed to have had regard to the only provisions in the Act relating to enhancements of money rents on the ground of a rise in prices; on the other hand, it constitutes a disregard or rejection of those provisions.

The primary function, no doubt, of the Settlement Officer in deciding what enhancement on the ground of a rise in prices would be justified is to settle a fair and equitable rate of rent; but such is also the function of a Revenue Court on an application under S. 30 (i). In the case of applications under Chapter III, the legislature has given detailed directions as to how this fair and equitable rate should be determined; it has said that in its opinion a fair and equitable rate of enhancement should have reference to the price-history of the last 30 years only and should in any case not exceed 12½ p.c. No different directions are given in Chapter XI as to how this fair and equitable enhancement should be determined; on the other hand, Chapter XI directs the Settlement Officer to have regard to the provisions in Chapter III. In the circumstances, the words "shall have regard to" can only be interpreted to mean "shall follow to the extent possible"; they cannot mean merely "shall take into consideration" or permit the Settlement Officer to disregard them in favour of what he, in variation of the expressed intentions of the legislature, may regard as fair and equitable. This explains why Reilly, J., said that where the Settlement Officer had to deal only with such questions as would arise in a suit for commutation or for enhancement or reduction of money rent, he must be guided by the appropriate principles as set out in the Act. The present is a case of enhancement of rates of money rent on the ground of a rise in prices and if the maximum limit on such enhancement—proviso (*b*) to S. 30 (i) and the periods to be taken for comparison of prices (S. 31) are not the appropriate principles set out in the Act for this purpose, it is difficult to see what are. I hold that the principle underlying S. 30 (i) and S. 31 is not merely that an enhancement should not be so great as to involve a drastic upsetting of the economic status of the ryot; the legislature has also specifically laid it down that in its opinion any enhancement at a time of over 12½ p.c. does constitute such a drastic upsetting and should therefore not be allowed. We cannot claim to have had regard to, or to have been guided by, these clearly expressed provisions of the Act if we substituted for them our own judgment that a 37½ per cent. would be fair and equitable and would not constitute a drastic upsetting of the economic status of the ryot.

For the reasons stated in the preceding paragraphs and in greater detail in my order under S. 171, I regret I must dissent

F.B.

Maharajah of Parlakimidi *v.* Ryots of the villages of Garabanda, Sariapalli and Ramachandrapuram.

from my colleagues. I consider that the petitioner is not, under the Estates Land Act, entitled to obtain an enhancement of more than 12½ per cent. on the existing rates of money rent for the different tarams and that the present revision petition deserves to be dismissed.

2nd October, 1936. Order passed by Mr. N. Gopalaswami Ayyangar, President:—

The decision of my two colleagues being that of a majority of the Board will, however, prevail and be given effect to.

Mr. N. Gopalaswami Ayyangar, Commissioner of Land Revenue Settlement, passed the following

*ORDER. This appeal under section 171, Estates Land Act, is from the ryots of the villages of Garabanda, Sariapalli and Ramachandrapuram (Garabanda group) against the order dated 10th December, 1935, of the Special Revenue Officer, Parlakimidi in his R.C. No. 1 of 1935. In that order he dismissed the appellants' objections to, and confirmed, his preliminary order dated 24th April, 1935, raising the *rates* of money rent now payable in the villages by 100 per cent.

2. The contentions on both sides and the order appealed against have assumed that though the case relates to the Garabanda group, the questions raised and the decisions thereon apply to the Estate as a whole. The arguments addressed to me in appeal by the learned counsel on both sides have also proceeded on this footing.

3. For showing the history of rents in the Estates, a large mass of correspondence has been filed as exhibits. In view of the fact that out of the period of 112 years between the permanent settlement of 1801 and the assumption of the Estate in 1913 by the present Maharajah, the Court of Wards were in management of the Estate for nearly 83 years in the aggregate and that their management was uninterrupted for 60 years between 1830 and 1890 —the period during which the existing money rates were fixed— this correspondence is of more than ordinary evidentiary value. It is gathered from this correspondence that the varam system was probably originally (*i.e.*, during the earlier half of the 19th century) in force. There is, however, absolutely no doubt that this system was given up and that since 1867-68 only money rents have been levied in this Estate.

4. A survey of the Estate was made between 1861 and 1865. The cultivable land was surveyed in blocks and, later, tarams were assigned to each block or defined portion of a block. The lands

---

* B. P. Mis. No. 1127 in Rent Appeal No. 4 of 1936. 30th March, 1936.

F.B.

Maharajah of Parlakimidi *v.* Ryots of the villages of Garabanda, Sariapalli and Ramachandrapuram.

were classified into Wet, Manavari and Dry and each of these classes was divided into 5 tarams. The tarams were apparently settled according to relative grain values ascertained, not from *Kyles*—which were held to be impracticable—but from inquiries of knowledgeable and disinterested persons made by the Manager of the Estate. The Collector in 1867 reported that in 3 villages which he had checked in detail he had found the classification to be correct in every case, and, in para. 8 of C. P. 821 dated 17th May, 1873, the proposal for a second survey was turned down on the ground, among others, that "both classification and survey had been correctly carried out". Inequality in assessments was obviously not excluded altogether in a classification made admittedly on rough lines but the results taken as a whole must be considered to have been satisfactory, judging from the opinion of Collector Horsley recorded 10 years later, *viz.*, that "it is probable that if the (wrongly classified) extent were re-classified, it would be found that inequality on the whole was as much in favour of the ryots as of the Estate". The money rates per acre which were then fixed in 1867-68 and have continued to this day were as follows:—

		Rs.	A.	P.
Wet	Taram I	.. 7	0	0
	II	.. 5	12	0
	III	.. 4	8	0
	IV	.. 3	0	0
	V	.. 2	0	0
Rainfed	Taram I	.. 4	8	0
	II	.. 3	0	0
	III	.. 2	4	0
	IV	.. 1	8	0
	V	.. 1	0	0
Dry	Taram I	.. 3	0	0
	II	.. 2	4	0
	III	.. 1	8	0
	IV	.. 1	0	0
	V	.. 0	8	0

5. The difficulties in working the settlement of 1867-68 which made their appearance later arose not so much from wrong taram classification or from any inadequacy of the money rate fixed for each taram as from the fact that collection of rents continued to be on the joint village system and that the Estate, in the absence of a regular detailed survey by holdings or fields, was unable to apportion the total rent on each block among the individual ryots holding land in that block. The collections were made on the khost system. The leading ryots undertook to pay the total of the rents due for the village as a whole and apportioned this total themselves among the individual ryots. There was complaint against this apportionment. An 'asamiwar' survey was commenced in 1881 and completed about 1885 at a cost of Rs. 1,88,981.

F.B.

Maharajah of Parlakimidi v. Ryots of the villages of Garabanda, Sariapalli and Ramachandrapuram.

The question of following this up by an individual-war settlement involving a revision of rents was examined by the Court of Wards but was negatived on the grounds that the substitution of the individual responsibility of the ryot alone for the joint and several responsibility of all the ryots—which then existed—would mean no advantage to the Estate, and that the legality of enhancing some of the rents which a settlement would necessarily involve was doubtful. The Court of Wards expressed themselves as follows:—

"The tenants of the estate have undoubtedly the privilege, under Act VIII of 1865 of continuing to hold under the existing rates of rent in the absence of the special circumstances mentioned in section 11 of that Act which enable the landlord to raise his rents. The Court are therefore of opinion that they could not legally enforce any enhancement of rents in the Zamindari, should any of the tenants resist the imposition of the new rates and they, therefore, decide not to attempt at present to introduce any revision of the existing settlement".

But they directed that the existing village rentals should be redistributed over the fields as surveyed and demarcated by the new survey and the new distribution noted on the village patta. Whether these instructions were acted on at once is not clear. The Estate ceased to be under Court of Wards management between 1890 and 1905. The Court of Wards however again assumed management in the latter year, and in 1906, Mr. May, the then Manager, commenced issuing pattas to individual ryots based presumably on the survey of 1881-85. But it was soon found necessary to carry out a regular and initial survey under Act IV of 1897. This was commenced in 1910 and completed in 1912. The question of applying under the new Estates Land Act, for a Record-of-Rights and Settlement was, however, deliberately left for decision to the Zamindar—who was to assume management in 1913—after he had gained some experience. Meanwhile the existing rates of rent were applied to the new survey extents and pattas issued on this basis. It was not expected that this adjustment would be seriously disputed by the ryots; nor is there anything on record to show that taking the Estate as a whole, it was seriously disputed in fact. But a Record-of-Rights and Settlement would, it was thought, become in due course desirable because of the statutory finality and the opportunity they would give of raising the rates with reference to the rise in prices, in other words, of obtaining "a general enhancement of rentals in every case of 2 annas in the rupee". There is evidence that, subsequent to his assumption of management, the Zamindar filed a few suits for enhancement under Chapter III and obtained decrees for an increase but only of 2 annas in the rupee. Examples are Exhibits N, N-1 and N-2. But the Zamindar soon found that the filing

F.B.

Maharajah of Parlakimidi *v.* Ryots of the villages of Garabanda, Sariapalli and Ramachandrapuram.

of summary suits for this purpose would be a prolonged and tedious process and, in 1925, applied for a Record-of-Rights and Settlement under Chapter XI of the Act. He gave full reasons for the application and the following extract from his letter dated 18th October, 1925, puts his case for a settlement of rents in the most unambiguous language:

> " 3. As regards settlement of the rent, the rates of rent now prevailing were originally introduced during the then Court of Wards' management in the eighteen sixties and they are now about sixty years old. Under S. 30 of the Estates Land Act, these rates long ago became liable to the full enhancement of two annas in the rupee on account of rise in prices. Again, considerable "improvements" to the irrigation works in the Estate were carried out at a great cost during the recent Court of Wards' management which terminated in 1913 and subsequently by myself. These improvements have been got registered by the Revenue Officer; and, under clause (ii) of S. 30, I am entitled to claim enhancement of rent on this ground; and there are also a few cases in which I can claim enhancement under clause (iv) of S. 30. What is required is really something like the re-settlement which Government makes in a Government taluk every thirty years. This implies the revision of the rent of every ryot in the Estate. If the rents of only a small number of ryots required revision, it might be possible to obtain the enhancement required by summary suits against the ryots concerned; but as a suit cannot be dispensed with (as the Act now stands) even when the ryot is willing to accept enhancement, the question of getting the enhancements now in question decreed by suits against the ryots of a whole Zamindari under S. 30 is quite out of the question, as the number of ryots to be dealt with will almost be a lakh, if not more. The simplest way, therefore, is obviously to have the rents "settled" under Chapter XI of the Act and hence I make this application.
>
> * * * * *
>
> "6. As already many years have passed by since the present Estates Land Act was passed without my getting the benefit of the enhancements allowed by S. 30, I solicit very early orders on this application and request that arrangements may be made to commence the operations with as little delay as practicable."

On 13th March, 1926, in a supplementary letter, he pointed out that, in view of the decision of the High Court which had been pronounced subsequent to his original application *Valluri Narasimha Rao* v. *The Ryots of Peddamamidipalli*[1] the Revenue Officer making a settlement under S. 168 would not be bound by the two anna limit in S. 30, and requested, that the Government

> " may be pleased to order the Revenue Officer to settle a fair and equitable rent for the lands in my Estate *in order that I may be able to obtain my remedy in the case of the original wrong classification referred to above on account of which lower assessments were imposed at the original settlement than was justified by the circumstances. Such cases will be comparatively few but I should be able to get the mistakes committed at the original settlement in this respect verified if possible by the Settlement Officer.*"

1. (1925) I.L.R. 49 Mad. 499.

F.B.

Maharajah of Parlakimidi *v.* Ryots of the villages of Garabanda, Sariapalli and Ramachandrapuram.

The notification under S. 164 directing the preparation of a Record-of-Rights was issued on 18th November, 1927. The record for the three villages included in Garabanda group was completed and finally published on 27th March, 1932. Settlement proceedings were subsequently started in pursuance of G. O. 3653 Law (General) dated 18th November, 1927, but, early in 1934, the legality of a direction for settlement before the final publication of the Record-of-Rights was raised on behalf of the ryots, and, on 19th December, 1934, Government issued a fresh order directing the settlement both under sub-S. (1) and sub-S. (1-A)—which latter had just become law under the amending Act of 1934—of S. 168. The order appealed against was passed in exercise of the powers traceable to this G. O.

6. The survey having been completed in 1912 and the Record-of-Rights finally published under S. 166(2) in 1932, the operations which may be said, to be involved in 'settlement' proper in an Estate where the rents payable are in money are—so far as the determination of the *rates* of such money rent is concerned,—broadly speaking, the following:—

(1) Determination of the number of tarams,

(2) Fixing the grain value for each taram,

(3) Assignment of the appropriate taram to each field, and

(4) Settling the money rate for each taram.

The Special Revenne Officer is obviously sound in laying down that, in all these four matters, there should be uniformity throughout the Estate and no exception can be taken to the conclusions he has arrived at in paras. 57-60 of his order. In spite of all that the Special Revenue Officer has, in the earlier portions of his order, said against the settlement of 1867-68, he came to the conclusion that the 5 taram grouping, of each class of land—Wet, Manavari and Dry—should neither be added to nor subtracted from. The conclusion is, however, the right one. As regards grain values, we have no definite information for 1867-68. It is, however, useful to fix a grain value to each taram as this will help in the rectification at this settlement (or re-settlement, as the Maharajah more appropriately described it in his application) of wrong taram grouping at original settlement, as also in the assignment of tarams to land to which no taram has been assigned already. Tarams have been fixed not merely with reference to the fertility of the soil but also with reference to the quality of the irrigation source and the position of the villages, but they are differentiated one from the other by their relative grain values. The Special Revenue Officer has given an estimate, in his order, of the *grain* outturn on each taram of Wet and Dry based presumably upon inspection and

F.B.

Maharajah of Parlakimidi *v.* Ryots of the villages of Garabanda, Sariapalli and Ramachandrapuram.

inquiry. I would accept these estimates and the grain value of each taram may be fixed as follows:—

Taram.	Grain value	
	Wet (Paddy)	Dry (Ragi).
I	25 putties	10
II	17	8
III	13	6
IV	10	4
V	8	3

There are no separate grain values for Manavari lands but the Special Revenue Officer thinks that the existing practice of placing them one taram higher than what they would be entitled to, if Dry, need not be disturbed and I agree with him.

7. The Special Revenue Officer says he has checked the taram grouping and rectified mistakes wherever found. No objections to orders of his on this score are before me in the present appeal which is confined to issue of a general nature.

8. The main issue in this appeal is thus item (4) in para. 6 and I now turn to its consideration.

9. The case for the appellants is two-fold, *viz.*:

(*a*) that the money rates fixed in 1867-68 cannot be raised at all, and

(*b*) that, if they could be raised, they could not be raised by more than two annas in the rupee.

The case for (*a*)—though I am bound to say that I failed to get the impression in the course of the hearing that it was pressed with seriousness on me—is attempted to be founded upon stray expressions in the correspondence between 1862 and 1887 which has been filed. I have read carefully through all these papers. The expressions referred to have reference rather to what the officers then believed to be the law under Act VIII of 1865 than to any intention on their part to fix rents for ever. There is no evidence that they entered into any engagements with the ryots that the rates of rent were fixed permanently. The correspondence between 1877 and 1887 on the other hand indicates the contrary when taken as a whole, and the Court of Wards then were impressed rather with the difficulty of making out the special circumstances under which alone, according to Act VIII of 1865, rents could be raised. The Act of 1908 made an important departure in this respect and Parlakimidi, like other Estates, acquired under it the right to obtain an enhancement of *rates* of rent in specified circumstances. It is clear that, though in 1868 the rates of money rent were *fixed*,

F.B.

Maharajah of Parlakimidi *v.* Ryots of the villages of Garabanda, Sariapalli and Ramachandrapuram.

they were not intended, or declared, to be *permanently payable.* This has also been judicially held in more than one suit relating to specific villages.

10. Item (*b*) in the previous para. demands more extended examination. The 2 anna limit is mentioned in S. 30 of the Estates Land Act, and the first question to consider is whether, in settling rents under S. 168 (2), the Special Revenue Officer is not bound to *conform* to the provisions of Chapter III. In *Valluri Narasimha Rao* v. *The Ryots of Peddamamidipalli*[1], it was held that the High Court had revisional jurisdiction over an order of the Board of Revenue uuder S. 171 and that a Revenue Officer was not, when settling a fair and equitable rent under S. 168, bound by the limitations in S. 30 relating to enhancement of rent. In *Rajah of Mandasa* v. *Jagannayakulu*[2], the first part of this decision was reversed by a Full Bench and it was held that the High Court had no such jurisdiction. It would seem to follow that the second part of the decision in *Valluri Narasimha Rao* v. *The Ryots of Peddamamidipalli*[1], which was arrived at in the exercise of a jurisdiction which the High Court does not possess is also no longer binding. This and the observations to a similar effect made in their judgments by some of the Judges who participated in the Full Bench decision, are undoubtedly entitled to the greatest respect, but in the nature of being *obiter dicta,* they do not possess the character of a ruling which I am bound to follow, whatever may be my own view of the correct interpretation of the Estates Land Act.

11. The only provision which gives any guidance to an officer *settling* rents under the Act is S. 168 (2). It lays down two leading principles:

(*a*) The Settling Officer *shall* presume until the contrary is proved that the existing *rate* of rent is fair and equitable; and

(*b*) He *shall* have regard to the provisions of the Act for determining the *rates* of rent payable by a ryot.

The "provisions of this Act" referred to in (*b*) are obviously those in Chapter III which is headed "General provisions relating to the *rates* of rent payable by ryots"; and

(*a*) is the same as S. 28 which is in Chapter III. A 'settlement' does no doubt mean more than a mere enhancement of rates and includes operations—*e.g.,* items (1) to (3) in para. 6—for which no guidance can be found in Chapter III or elsewhere in the Act. In the case of these latter operations, the Revenue Officer must follow such rules as Government may have issued under

---

1. (1925) I.L.R. 49 Mad. 499.
2. (1931) 63 M.L.J. 450 (F.B.).

F.B.
Maharajah of Parlakimidi v. Ryots of the villages of Garabanda, Sariapalli and Ramachandrapuram.

S. 215 or, in the absence of such rules, draw upon his own knowledge, inspection and experience. But, in matters—like item (4) in para. 6—in respect of which the clearest injunctions are laid down in Chapter III, it would be anomalous to hold that the Revenue Officer could ignore these injunctions and substitute for them, his own *a priori* judgment of what is fair and equitable. The Act must be construed as a whole and it would be an insult to the intelligence of the legislature to lay down that it intended that a Zamindar who cannot obtain an enhancement of more than 12½ per cent. by suit (now application) against any individual tenant under Chapter III will, however, be entitled to obtain it against all his tenants *en masse* by applying for a settlement under S. 168. To assent to such a position would amount to a mockery of the words "shall have regard to the provisions of this Act" in S. 168 (2) and of the direction in R. 18 of the statutory rules.

12. The learned Advocate-General, who appeared for the Zamindar, has argued that the Special Officer's duty is to fix a fair and equitable rent, that the standard of what is fair and equitable is indicated in several sections of the Act to be the *varam*; and that, where the existing money rent falls below the commuted value of the *varam*, it can be made fair and equitable only by being raised to such commuted value. The implication of this argument is that, if there are any provisions in Chapter III which stand in the way of raising the rent to this standard, the Special Officer should, instead of having regard to them, disregard them; the implication has only to be stated in order to realise the untenability of the argument.

13. The learned Advocate-General went further and contended that, even under Chapter III of the Act, the landholder would be entitled to such a raising to the standard furnished by the commuted value of the *varam* and that S. 30 is only supplemental to, and independent of, this general right, the authority for which, according to him, is to be found in Ss. 27 and 28. These sections raise only presumptions which could be rebutted. Hence, it is argued, the landholder is given the right under S. 28 to prove that the rate of rent for the time being lawfully payable is *not* fair and equitable. This, no doubt, is true, but the relevant question is what, on such proof, is the remedy available to the landholder? It can only be a remedy specifically given by the Act. S. 24 lays down peremptorily the general proposition that the rent of a ryot shall not be enhanced except as provided by the Act and S. 30 roundly declares in the clearest possible terms, that, where the rent payable is a money rent, the rate of it may be enhanced on one or more of the four grounds mentioned in the section *and on no others*, and proviso (*a*) to sub-section (i) prohibits any increase beyond

2 annas in the rupee where the enhancement is applied for on the ground of a rise in prices. The scheme of the Act as regards the determination of the *rates* of rent payable by ryots is both simple and unmistakeable. Existing rates of rent which are presumed to be fair and equitable may be either in kind or in money. The former cannot be enhanced at all. Rates of money rent can be raised only on certain specified grounds and subject, in the case of an enhancement on the ground of a rise in prices, to a limit of 2 annas in the rupee and to conditions as to how the rise in prices should be calculated for this purpose. If there is one principle which is writ large on the face of Chapter III, it is that, in the case of *rates of money rent*, the landholder cannot claim an enhancement except on the grounds and subject to the limits stated in that chapter. This is not surprising in view of his position in this respect under Act VIII of 1865. There was the most rigorous opposition, when the Bill which became Act I of 1908 was under discussion in the Legislative Council, to allowing a claim to any enhancement at all of money rents on the ground of a rise in prices; but when this opposition failed, the 12½ per cent. maximum was agreed to finally with the consent of the landholders' representative in Council. It will be a negation not merely of the express provisions of the Act relating to the determination of *rates* of rent but of the whole policy underlying those provisions to say that either S. 28 or a settlement under S. 168 permits an enhancement of *rates* of money rent except in accordance with those provisions. If those provisions do not permit an enhancement at all, the Special Officer cannot grant it; if, according to those provisions, an enhancement of 2 annas or less alone is permissible, the Special Officer is bound, under the law, to treat the existing rates raised by such an enhancement as fair and equitable even if they happen to be lower than the commuted value of the theoretical *varam* or *rajabhagam*.

F.B.

Maharajah of Parlakimidi *v.* Ryots of the villages of Garabanda, Sariapalli and Ramachandrapuram.

Even Mr. Justice Reilly—from whose judgment in *Rajah of Mandasa* v. *Jagannayakulu*[1], the Special Revenue Officer has quoted profusely—had to concede that:

"Where the Special Officer has to deal only with such questions as would arise in a suit . . . . for enhancement of money rent, under S. 168 (2) he must be guided by the appropriate principles as set out in the Act".

The only questions that arise in the present case so far as the money *rates* are concerned are whether the rise in prices justifies an enhancement and if so how much; and these are the identical questions which arise in a suit (or application) for enhancement under section 30.

1. (1931) 63 M.L.J. 450 (F.B.).

F.B.

Maharajah of Parlakimidi *v.* Ryots of the villages of Garabanda, Sariapalli and Ramachandrapuram.

14. The existing money rates have been paid unbrokenly for nearly 70 years and there is small justification—and no warrant in the Act—for canvassing at all, at this distance of time, the question whether when they were fixed they represented the correct *rajabhagam*. It is worth recalling in this connection the fact that, when the Bill which became Act I of 1908 was under discussion, an amendment to clause 27 (present section 30) to add a sub-clause giving the right to claim an enhancement on the ground that the existing rent was below the prevailing rate for lands of similar description and that there is no sufficient reason to justify such a low rate was opposed by Government and negatived. We can neither revert to *varam* in this Estate nor apply the *varam* touchstone to the fairness and equitableness of any *rates* that even now we may decide on. I would, however, point out, in passing that though the *rates* fixed in 1867-68 were described as moderate, they have been higher than both the original settlement and the current re-settlement, rates of the Chicacole Government taluk. What is more, they cannot even be considered to have been unfair or inequitable when they were fixed with reference to the theoretical *rajabhagam* of one-half the gross produce. Taking 1st taram Wet, the grain outturn of 25 putties at the price which the Special Revenue Officer has held to have prevailed in 1867 could not have been more than Rs. 17; this was at the Parlakimidi price and some deduction would be justified before arriving at the value in the villages; the *rajabhagam* could at the most be estimated at Rs. $7\frac{1}{2}$ to 8 and Rs. 7 as a fixed money rate payable every year could not be described as unfair or inequitable.

15. On account, however, of the rise in prices, what was fair and equitable in 1867-8 has become somewhat unfair and inequitable to the landholder and he is under Section 30 entitled to an enhancement subject to the maximum limit of 2 annas in the rupee.

16. The decennial periods, the prices of which have to be compared under Section 31, are—

(*a*) the ten years immediately preceding the application for enhancement, and

(*b*) the ten years ending twenty years immediately before the application.

The date of application in the present case for a settlement is 18th October, 1925, but this was obviously premature under the provisions of the unamended Act. The legality of the order based thereon was doubted and a fresh order was passed under sub-section (1) as well as sub-section (1-A) of Section 168, under the latter of which, the Local Government could *suo motu* order a settlement. It is this fresh order that is the authority now for the

F.B.

Maharajah of Parlakimidi v. Ryots of the villages of Garabanda, Sariapalli and Ramachandrapuram.

settlement. There is, and can be, no application in the case of an order under sub-section (1-A) and it would seem only reasonable in such a case to take the date of the order itself for the purpose of determining the decennial periods referred to in section 31. These periods will then be the ten faslis ending with fasli 1343 (there were no famine years in this period) and the ten non-famine faslis ending with fasli 1323 (The Special Revenue Officer was clearly wrong in taking the ten years ending 1925 and the single year 1868 for purposes of comparison). The Parlakimidi prices for paddy and ragi of each fasli in the 2 periods taken are given in the attached statement; they are those on record in the Board's office. The averages are compared below:—

	Earlier decennium.	Later decennium.	Half of excess percentage [proviso to S. 31 (e).]
Paddy	.. 94	131	19
Ragi	.. 97	132	18

The maximum of 2 annas in the rupee (or $12\frac{1}{2}$ per cent.) is thus allowable as an addition to each of the existing taram rates.

17. The Special Revenue Officer has misdirected himself in respect of several matters. His statement that "the principle laid down in Chapter III is only for arriving at a lawful rent and not so much a rent that is fair and equitable" is manifestly wrong. The principle of that Chapter is that no enhancements on grounds or beyond the limits laid down therein can be deemed to be fair or equitable and that enhancements otherwise allowable under its provisions should be refused or moderated if they would work unfairly and inequitably. His assumption that, if a settlement under the provisions of Chapter XI had not already taken place, the existing money rents could be enhanced without limit and that Chapter III could be ignored, if its provisions were "likely to bind my hands and prevent me from using my discretion and experience in the matter of this settlement", is against the express provisions of the Act. His description of the tenure in the Estate as no tenure at all is an exaggeration. His choice, amongst the provisions of Sections 30 and 31, of those he would follow and those he would reject is capricious. His conception of his own unfettered powers as a Settlement Officer reached even the absurd length of committing himself to the statement that he would ignore decrees or orders of Courts of law fixing rents or enhancements of rents in the case of particular villages in recent years. It is unnecessary to burden this order with other examples of his misdirections to himself. It is not a matter for surprise that having persuaded himself to accept, and act on, the view that, as an executive officer conducting a settlement of rents, he was altogether untrammelled

F.B.

Maharajah of Parlakimidi *v.* Ryots of the villages of Garabanda, Sariapalli and Ramachandrapuram.

by the limitations and restrictions of the Act regarding enhancements of rates of money rent, he reached the conclusion that a 100 per cent. enhancement was both fair and equitable.

18. I hold, however, that his conclusion is wrong, that he was bound by the provisions of Chapter III of the Act, and that the enhancement which, *on the ground of a rise in prices* he was competent to order in the existing *money rates* was only 12½ per cent. I therefore direct that he do revise his new uniform money rates accordingly.

19. The 2 anna limit, it is necessary to insist, is applicable only to the uniform money *rates* for the different tarams. It cannot apply to any enhancements of the actual money rent hitherto paid by a ryot which may result from the Special Revenue Officer's correction of any wrong taram grouping which he finds to have been assigned at the original settlement or from the application of sections 42 and 43. Nor can the limit be applied to enhancements (which, in view of the laying down of uniform tarams and money rates, should ordinarily take the form of raising the existing taram classification) which are allowable under sub-section (*ii*) or sub-section (*iv*) of Section 30 read with sections 32 and 34.

20. In view of my decision in para. 18, the Special Officer should re-examine the necessity for the concession allowable under Section 36 and as a result of such examination cancel or modify, the direction given in para. 63 of his order. There would seem to be no need to refuse altogether the concession he has given under Rule 22 of the statutory rules but the Special Revenue Officer may modify the terms of this concession, if he finds this course justified in all the circumstances. In doing so, however, he should remember that the concession under Rule 22 is not the same as the one under Section 36 and has reference to the amount of rent payable by a ryot on all the lands in his holding.

21. The orders of the Special Revenue Officer in respect of baling remissions, kist months, the fasli from which the settlement will take effect and the special rate of rent on the house-site in Garabanda have not been questioned and will not be disturbed.

[FULL BOARD.]

IN THE BOARD OF REVENUE AT MADRAS.

PRESENT:—DIWAN BAHADUR N. GOPALASWAMI AYYANGAR, COMMISSIONER OF LAND REVENUE AND SETTLEMENT, MR. C. A. HENDERSON, COMMISSIONER OF LAND REVENUE AND MR. A. H. A. TODD, COMMISSIONER OF EXCISE.

Zamindar of Khallikote and Atagada Estates .. *Petitioner**

v.

The Ryots of Khallikote and Atagada Estates .. *Counter-Petitioners.*

F.B.

Zamindar of Khallikote *v.* Ryots of Khallikote.

Madras Estates Land Act (I of 1908), S. 168 (1)—Settlement of rents—Lump rent for a certain area fixed—Excess area discovered by survey—Land within the same boundaries—Whether rent can be allowed for the excess area.

Full Board:—Where the rent paid in the past was a consolidated rent for the entire area on the basis of an assumed extent, even if the assumed area has been shown to have been under-estimated by accurate survey, no additional rent for the excess area discovered by survey can be allowed.

Per *Diwan Bahadur N. Gopalaswami Ayyangar*:—Where the rent fixed was a lump one on land within stated or well-recognised boundaries, and the approximate extent of the land was assumed to be a certain area, but the actual area is found to be larger than the assumed one and the whole of the excess area is situated within the recognised boundaries, additional rent for the excess of the actual over the assumed area must be disallowed, in the absence of a provision to the contrary in the muchilika.

Application in revision under S. 172 of the Madras Estates Land Act against the Order of the Board of Revenue in Appeal No. 13 of 1934.

Sir Alladi Krishnaswami Aiyar and *Mr. C. Sambasiva Rao* for Petitioner.

Mr. B. Jagannadha Das for Counter-Petitioners.

The Collective Board passed the following

ORDER. These are revision petitions against the orders of the Board of Revenue specified in the Appendix. As the petitions are against the orders passed by one member of the Board on appeal under S. 171 of the Act, they have been heard by the Collective Board under S. 172 of the Madras Estates Land Act, 1908, as amended by Act VIII of 1934.

It was argued for the landholder that the average of the widely divergent estimates of crop outturn recorded in the Estate's *pachu* accounts should be adopted as the basis for fixing fair and equitable rents for the lands comprised in the *khost* lease. These accounts show the *khost* lease area divided into a number of

---

* B. P. Mis. No. 1984 in R. Ps. Nos. 12 of 35 and 20, 63, 64, 65, 66, 67, 68 and 72 of 1936. 13th June, 1936.

F. B.

Zamindar of Khallikote *v.* Ryots of Khallikote.

blocks; against each block is entered the area and an estimate of the crop outturn made by the village officers; another estimate made by the Revenue Inspector of the Estate; and in some cases a further estimate made in the Taluk Office of the Estate.

It has been the practice at the annual jamabandi for the Manager, after taking note of these estimates, and occasionally independent estimation, to discuss them with the tenants and to negotiate with them, and finally to fix a consolidated crop rent on all the blocks combined. This is the rent which is finally agreed to by the tenants and entered in the muchilika executed by the tenants.

In its Resolution Mis. No. 4517, dated 15th December, 1934, the Collective Board directed that the *pachu* accounts should form the basis on which the Collector should fix the rents; and from that order it would appear that the chief reason for this direction was that these accounts have been accepted by both parties for a long period as a fair and equitable basis.

The Collective Board, as at present constituted, agrees with the finding of the single member in paragraph 5 of his Order Mis. No. 458 dated 10th February, 1936, that the only figure in the *pachu* accounts which really satisfies the criterion of acceptance by both parties is the final figure of demand settled at Jamabandi after the negotiations with the tenants referred to above. This figure is settled on the whole *khost* area and is entered in the muchilika.

It is clear that the estimates of the Village Officers and of the Estate Revenue Inspectors, even the estimates in modification made in the Estate Taluk Office or by the Manager, do not satisfy the criterion of long acceptance by both parties, because these have not been adopted for final settlement of the Estate's lump demand, and in fact they vary very widely from one another. If the order in B. P. Mis. No. 4517 dated 15th December, 1934, contemplated that the average of these varying estimates, which are exhibited in the *pachu* accounts, should be taken as the basis for fixing a fair and equitable rent, after allowing a deduction of 10 per cent. for probable over-estimation, the Collective Board, as at present constituted, is constrained to differ from the Order referred to above.

The Board consequently disallows the contention of the land-holder, and directs that the ten years' average of the total crop rent, as settled at Jamabandi, should be adopted as the basis of a fair and equitable rent for the lands comprised in the *khost* lease area.

In this view, the question of over-estimation of the crop outturn does not arise, and the Collective Board as at present

F.B.

Zamindar of Khallikote v. Ryots of Khallikote.

constituted does not consider it necessary to direct that a deduction of 10 per cent. be made on that account from the average rent so arrived at.

The Board also agrees with the finding of the single member recorded in paragraphs 8 and 9 of B. P. Mis. 458, dated 10th February, 1936. The rent hitherto paid has been a consolidated rent for the entire area included in the *khost* lease, even if the assumed area has been shown to have been under-estimated by accurate survey. No additional rent for the excess area discovered by survey can be allowed.

Finally the Board agrees with the decision of the single member in paragraph 10 of his Order Mis. 458, dated 10th February, 1936, in respect of Chillara jirayati lands, except that, in accordance with the decision come to as regards *khost* lease lands, no 10 per cent. deduction should be made.

Diwan Bahadur N. Gopalaswami Ayyangar, Commissioner of Land Revenue and Settlement, passed the following

ORDER.* This is an appeal under S. 171 of the Estates Land Act against the order of the Additional Revenue Officer, Chatrapur, dated 25th May, 1934, settling the rents in Thulasipur village. The appellant is the proprietor of Khallikote and Atagada estates.

2. The rents fixed by the Additional Revenue Officer were based upon estimates of crop outturns made by himself after personal inspection; those estimates had reference to the quality of the soil, the irrigation facilities available, etc., of the different classes of land. The appellant contends that the Additional Revenue Officer instead of making his own estimates should have adopted the average of the crop outturns given in the *pachu* accounts of the estate and relies for the purpose on the decision in B. P. Mis. No. 834 dated 12th March, 1934.

3. This decision which was by a single member of the Board was subsequently confirmed by the Full Board in B. P. Mis. 4517 dated 15th December, 1934, and has to be followed in deciding this appeal. In applying it, however, more than one difficulty has to be surmounted and in respect of these difficulties the Additional Revenue Officer should have clear instructions. They arise from possible differences of opinion as to how the Full Board's decision should be interpreted and from the fact that the *pachu* accounts do not cover all the land paying rent in the estate.

4. The total surveyed extent of wet and rain-fed ryoti lands owned by private individuals in the estate is 603·43 acres and this is distributed as follows:—

*B.P. Mis. 458 in Appeal No. 13 of 1934. 10th February, 1936.

F.B.

Zamindar of Khallikote v. Ryots of Khallikote.

			Acres.
(1)	Khost lease lands	..	449·81
(2)	Chillara jirayati lands	..	144·18
(3)	A Banjar	..	1·19
(4)	Nutono Berhampur Banjar	..	2·53
(5)	Choppamani	..	5·72

The Additional Revenue Officer's decisions in respect of items (3) to (5) are not specifically in issue in this case and will therefore not be interfered with. *Pachu* accounts are available in respect of item (1) but not in respect of item (2). The Full Board's decision can in terms apply therefore only to item (1).

That decision was that with reference to both S. 168 (2) and S. 40 of the Estates Land Act, the average value of the rent actually accrued due to the landholders according to the *pachu* accounts of the previous ten non-famine years should be the basis for fixing a fair and equitable rent for the reason that

" they (*pachu* accounts) have been accepted by both parties for a long period as a fair and equitable basis and that there is no reason for departing from what is clearly the established custom in these estates".

The Full Board, however, proceeded to add:

" At the same time in order to counteract any tendency to undue inflation on the part of the estate officials, it considers that a deduction of 10 per cent. may legitimately be made from the average estimates of crop outturn in the *pachu* accounts before the final rentals are fixed".

5. Now the *pachu* accounts are accounts prepared by estate officials. These accounts divide the *khost* lease area into a number of blocks. For each of these blocks, the outturn for each year is estimated by the Village Officers; the Village Officers' estimates are checked by Revenue Inspectors and sometimes by the Manager of the estate. At the time of Jamabandi, the Manager after discussing these estimates with the ryots and negotiating with them finally fixes the total crop rent on all the blocks together. This rent is what is agreed to by the ryots and entered in the muchilika executed by them. The justification for the Board directing the substitution of the average of the crop outturns shown in the *pachu* accounts for those independently estimated by the Additional Revenue Officer himself is that the former have been accepted by both the landholder and the ryots. The only figure in the *pachu* accounts which satisfies this criterion is the final lump figure settled at 'Jamabandi' and entered in the muchilika. Neither the Village Officers' nor the Revenue Inspectors' estimates found in the *pachu* accounts satisfy it. It is from the average of the total crop rent settled at Jamabandi therefore that according to the Full Board's decision, the deduction of 10 per cent. has to be made for the purpose of arriving at the fair and equitable rent. The Additional Revenue Officer should act accordingly.

F.B.

Zamindar of Khallikote *v.* Ryots of Khallikote.

6. It is admitted by the Diwan of the estate himself that the estate itself made no attempt to apportion the lump rent so settled among the holdings comprised in the *khost* lease blocks and that this apportionment was done by the ryots themselves. There is no evidence as to how this apportionment actually worked out.

7. The Officer settling rents has, however, to fix the rent on each holding with reference to fertility, productivity, irrigation facilities, etc. He has classified the wet and rain-fed lands into a number of tarams. No objection has been taken by the landholders or the ryots to this classification. The effect of the Full Board decision is that the rates for the different tarams should be so fixed as to produce for the *khost* lease area the value at the commutation price fixed (which has not been questioned in the course of this appeal) of the fair and equitable rent according to the *pachu* accounts arrived at in the manner already explained.

8. The lump rent for *khost* lease lands for each year was fixed on an assumed extent of 339·40 acres, but the actual surveyed extent is 449·81 acres. It is contended for the appellant that additional rent on the extra 110·41 acres is due to him. He would divide the average lump rent according to the *pachu* accounts by 339·40, arrive at the average rate of rent per acre and apply it to the 110·41 acres. The Full Board did not touch this question in its decision dated 15th December, 1934. There is, however, a decision of the Full Board dated 22nd June, 1926, which confirmed a decision of a single member of the Board dated 7th December, 1925, negativing in the case of certain other villages in the same estate a similar claim made by the proprietor. Apart from the existence of such a decision, the Board as now constituted is satisfied that it is correct on the merits and that extra rent for additional area disclosed by survey in the *khost* lease area should be disallowed.

9. It is conceded by Counsel for the appellant that it may be taken generally that the excess area is not the result of any extension of cultivation due to encroachment by individual ryots on previously unoccupied land adjoining their original holdings. The extra 110·41 acres have, strangely enough, been identified with specific survey numbers but this, it is admitted, was done only when, in connection with the present appeal, the Board called for particulars of the excess area. This identification is therefore of no value. The yearly *khost* muchilika states merely that the area included in the lease

"according to karnam's approximate account is wet 339 acres situated within the boundaries shown in the enclosed schedule. . . . . ;"

and that the executants

F.B.
Zamindar of Khallikote *v.* Ryots of Khallikote.

"agree to pay paddy . . . . . bharanams towards the *rajabhagam* of the several crops raised in the lands for fasli. . . . ."

It is clear that the rent fixed was a lump one on land within stated (or well-recognised) boundaries, that the extent of this land was assumed to be 339 acres and that both sides understood that the extent entered in the document was only approximate. There is no clause in the document that if the actual area was found to be larger than the assumed one, additional rent would be payable. A presumption to this effect might possibly have been raised if the muchilika had fixed the rate of rent per acre leaving the total rent to be arrived at by multiplying the assumed extent by this rate. But the document does nothing of the kind; it fixes the lump rent on land, within certain boundaries, the approximate extent of which it assumes to be 339 acres. It is further not disputed that the whole of the excess area is situate within the recognised boundaries of the *khost* lease area and in the midst of and scattered through the blocks mentioned in the *pachu* accounts. Counsel for the appellant drew attention to the fact that in the *pachu* accounts the estimates of crop outturn are given by blocks at so much per bharanam. These estimates are however those of the Village Officers and the Revenue Inspectors of the estate. The rates per bharanam entered in these estimates are average ones for whole blocks each of which must have included lands of varying quality and must therefore be treated as wild guesses in view of the fact that they were not sure either of the actual extent of each block or of that of the different qualities of land in it; also there is no certainty that they correctly converted the local unit of extent into acres and cents. What perhaps is more likely is that these estate officials inspected the crops on each block as a whole and estimated what the crop outturn on it might be taken to be and then divided this by the karnam's approximate extent of the block in order to arrive at the so-called rate per bharanam or acre. The average rates of rent for each block entered in the *pachu* accounts are, therefore, the Board considers, not figures on which reliance can be placed. The fact also remains that at Jamabandi the Manager fixed only the total rent for the whole area and made no attempt to readjust in the *pachu* accounts the average rates of rent given therein for the different blocks; on the other hand, the ryots were left to fix these rates among themselves. In the circumstances, the Board must hold that the crop rent settled at Jamabandi and entered in the *khost* muchilika reduced by ten per cent. must be deemed to be the fair and equitable crop rent for the whole of the extent included within the recognised limits of the *khost* area, *i.e.*, 449·81 acres and that additional rent for the excess of actual over assumed area must be disallowed.

F.B.

Zamindar of Khallikote v. Ryots of Khallikote.

10. As regards *chillara jirayati* lands—item (2) in para. 4 above—there are, as has already been said, no *pachu* accounts. But the Additional Revenue Officer has since obtained and submitted extracts from the Estate's chillara jamabandi diaries for the ten faslis 1333 to 1342. These diaries show the settled paddy demand against each holding for each fasli. There is no reason why the principle of the Full Board's decision dated 15th December, 1934, should not be applied to the *chillara jirayati* lands. The jamabandi diaries showing the paddy demand will accordingly be accepted as the basis and for the purpose of fixing a fair and equitable rent, a deduction of 10 per cent. will be made from the average total paddy demand for these lands as shown in the diaries.

11. The Additional Revenue Officer will be directed to revise the total rent on the *khost* lease lands (449·81 acres) and the *chillara jirayati* lands (144·18 acres) in accordance with the directions contained in this order and to carry out such modifications of the rates for his different tarams as are necessitated by this revision. His settlement of rents will in all other respects be left undisturbed.

[THE END.]